Power Commission (No. 20435 in the Court of Appeals for the Ninth Circuit), opinion reported at 359 F. 2d 165.[2]

Citations to Opinions Below.

The relevant decisions of the Commission and the court below are set forth in chronological order in the appendixes hereto, as follows:

Appendix	Decision
A	Opinion No. 381 of Commission, *Pacific Power & Light Co., Project No. 2082,* issued March 14, 1963, 29 F.P.C. 478.
B	Opinion No. 381-A (on rehearing) of Commission, issued August 19, 1963, 30 F.P.C. 499.
C	Decree and Opinion of Court of Appeals for the Ninth Circuit in *Pacific Power & Light Co., Department of Fish and Game of the State of California v. Federal Power Commission,* filed June 8, 1964, 333 F. 2d 689, *cert. denied sub nom. Department of Fish and Game of California v. Federal Power Commission,* 379 U.S. 969 (1965).

[2]The petition would search the record, to review the prior opinion of the Ninth Circuit in this same matter: Pacific Power & Light Co., Department of Fish and Game of the State of California v. Federal Power Commission (Nos. 11853, 18954, in the Court of Appeals for the Ninth Circuit), opinion reported at 333 F. 2d 689 (1964), *cert. denied sub nom.* Department of Fish and Game of California v. Federal Power Commission, 379 U.S. 969 (1965).

Both the Commission and Licensee opposed the Department's petition for certiorari from that 1964 decision upon the ground that the case was not ripe for review because of further proceedings that the remand in the 1964 decision had left to the Commission (No. 648, October Term 1964). Certiorari was denied without opinion.

D Order of Commission, *Pacific Power & Light Co., Project No. 2082,* issued June 23, 1965, 33 F.P.C. 1282.

E Order (denying rehearing) of Commission, issued August 20, 1965, 34 F.P.C. .....

F Decree and Opinion of Court of Appeals for the Ninth Circuit in *Department of Fish and Game of the State of California v. Federal Power Commission,* filed March 4, 1966, 359 F. 2d 165.

Jurisdiction.

The decree was entered pursuant to the opinion of the Court of Appeals for the Ninth Circuit, filed on March 4, 1966 (App. F hereto). The Department's petition for rehearing, served and filed March 31, 1966, was denied on June 8, 1966 [R. (v. 3) 152-59, 161-62].

Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1) (1964).

Questions Presented.

Section 10(a) of the Federal Power Act [41 Stat. 1068 (1920), as amended, 16 U.S.C. § 803(a) (1964)] requires that any hydroelectric power project licensed by the Commission shall be such, as in the Commission's judgment,

> will be best adapted to a comprehensive plan for improving or developing a waterway . . . for . . . beneficial public uses, including recreational purposes . . . .

Section 10(a) further provides that, if necessary, the Commission shall require modification of the project plans and specifications to secure those objectives.

Pursuant to section 10(a), the Commission has determined that fishery facilities[3] are required at Licensee's Iron Gate Development on the Klamath River in California, to preserve a part of the anadromous fish resource on the Klamath River that would otherwise be destroyed by Licensee's project (Iron Gate Dam cuts off access to spawning grounds). The Commission also claims that the dam and fishery facilities will enhance that anadromous fish resource over natural conditions.

The following basic question is presented:

> Does section 10(a) of the Federal Power Act require the Commission to order its Licensee to bear *all* operation and maintenance costs of the fishery facilities[4] that the Commission has ordered Licensee to construct[5] at its Iron Gate Development (except to the extent that the Department may have voluntarily agreed to bear such costs)?

The following subsidiary questions are also presented:

1. To what extent has the Department voluntarily agreed to bear operation and maintenance costs of fishery facilities at Licensee's Iron Gate Development?

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[3]The fishery facilities consist of two integrated structures: (1) Fish trapping and egg collecting facilities, which are used to capture the anadromous fish migrating upstream to strip out and fertilize the eggs; and (2) fish hatchery facilities, which are used to hatch the eggs and raise the young fish until they are big enough to be returned to the river.

[4]No party has contended that imposition upon Licensee of all operation and maintenance costs of all fishery facilities at Iron Gate (or of just the hatchery facilities), would render that development economically infeasible. See App. A at 13A.

[5]The Commission has already ordered Licensee to bear all *construction* costs for the fish hatchery facilities at Iron Gate. Licensee agreed to pay for *construction* costs of the fish trapping and egg collecting facilities.

2. What is the effect of any such undertaking by the Department on the Commission's authority to require the Licensee to reimburse the Department for all operation and maintenance costs for the fish trapping and egg collecting facilities at Iron Gate Development?

3. To what extent and in what manner, if at all, will the Iron Gate Development enhance the anadromous fishery resource of the Klamath River over natural conditions?

Statute Involved.

The statutory provision involved is section 10(a) of the Federal Power Act (41 Stat. 1068 (1920), as amended, 16 U.S.C. § 803(a) (1964)), which provides:

> All licenses issued under [the Federal Power Act] shall be on the following conditions:
>
> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

Statement.

Basis for Jurisdiction of Federal Court of First Instance (Court of Appeals for Ninth Circuit).

This is a proceeding to review orders of the Federal Power Commission. The jurisdiction of the Court of Appeals for the Ninth Circuit to review the orders, based upon section 313(b) of the Federal Power Act [49 Stat. 860 (1935), as amended, 16 U.S.C. §825*l*(b) (1964)],[6] was invoked by a timely petition filed in that court by the Department [R. (v. 3) 2-27].

Geographic Facts.

Licensee owns a series of dams and hydroelectric plants on the Klamath River in Oregon and California, all covered by one Commission license and collectively designated as "Project No. 2082." 13 F.P.C. 1 (1954); 23 F.P.C. 59 (1960).

The developments considered in this proceeding are part of Project No. 2082, and are located in northern

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[6]The first sentence of §313(b) provides:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modifid or set aside in whole or in part.

The order under review relates to a licensee that does business in California and has its principal place of business at Portland, Oregon—both within the geographical boundaries of the Court of Appeals for the Ninth Circuit.

California, just below the Oregon border. In downstream order, these developments are:

Copco No. 1
Copco No. 2
Iron Gate

(These developments are shown on a map [29 F.P.C. at 487], which is App. A at 20A.)

Power generated at these plants is sold interstate.

Background Facts.

The Klamath River is a major sports-fishing area for anadromous fish, primarily king salmon, silver salmon, and steelhead trout.

Licensee constructed Copco No. 1 in 1918 and Copco No. 2 in 1925, on the Klamath River. These developments have been operated as peaking plants, generating electric power by release of water only during peak demand periods of the day. The sudden and extreme fluctuations of flow that resulted below the dams, varying from practically no flow to unusually high flow, endangered human life and harmed the anadromous fish, many of which became stranded and died during the low flow periods (App. A at 4A, 22A).

Licensee could have rectified this condition, either (1) by changing its method of operation or (2) by constructing a reregulating reservoir downstream. Looking solely to its own financial self-interest, Licensee chose the latter alternative. It applied to the Commission for a license to construct Iron Gate, which would reregulate the Copco releases and also generate electric energy (App. A at 12A-13A).

Iron Gate Dam and powerplant have been completed and are in operation (App. A at 6A-7A).

The Present Dispute.

Although Iron Gate now irons out the fluctuating Copco releases, it creates a major new problem that gives rise to the pending proceeding; It blocks about 16 miles of valuable spawning grounds in the Klamath and its tributaries between Iron Gate and Copco No. 2. Approximately 57.1 per cent of the anadromous fish passing the Klamathon fish counting station below Iron Gate would normally spawn above Iron Gate (App. A at 9A-10A, 16A, 26A-27A).

The fishery facilities required to compensate for loss of those spawning grounds consist of two integrated structures:

(1) *Fish trapping and egg collecting facilities,* where the migrating fish are caught and the eggs removed and fertilized;

and

(2) *fish hatchery facilities,* where the eggs are hatched and the young fish are raised until they are big enough to be returned to the river.

In 1959, Licensee and the Department entered into an agreement that Licensee would construct the fish trapping and egg collecting facilities at Iron Gate at Licensee's sole expense. These facilities have been completed and are in operation (App. A at 4A-6A).

Four rounds of litigation followed before the Commission and the Court of Appeals for the Ninth Circuit:

First Round: Proceedings Before Commission (Apps. A and B, 1961-1963).

In 1961, the Department petitioned the Commission to order Licensee to construct the hatchery facilities

at its sole expense[7] and to reimburse the Department for all operation and maintenance costs for all fishery facilities at Iron Gate.[8]

In its decisions on the matter initially and on rehearing, the Commission ordered Licensee to construct the hatchery facilities at its sole expense. However, the Commission required Licensee to reimburse the Department for only 80 per cent of the operation and maintenance costs for all fishery facilities at Iron Gate, *i.e.*, for the completed fish trapping and egg collecting facilities and for the hatchery facilities ordered to be constructed (Apps. A and B).

The basic question presented on this petition revolves about our challenge to that decision upon the ground that it fails to impose *all* operation and maintenance costs upon Licensee, except to the limited extent that the Department has voluntarily consented to bear a portion of such costs for king salmon only.[9] On

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[7]The size of the hatchery is not in dispute, as the parties stipulated to the size should a hatchery be required by the Commission (App. A at 7A).

[8]The Department will physically operate and maintain the fishery facilities. For example, it has the trained personnel and expertise to do so; it is not subject to ad valorem taxes. (*Cf.* App. C at 72A-73A). The issue of Licensee's responsibility for operation and maintenance costs is therefore always cast in terms of the extent to which Licensee will reimburse the Department for such costs that are in fact incurred.

[9]We concede only that the Department has voluntarily consented to bear operation and maintenance costs of Iron Gate fishery facilities that may be incurred for all king salmon eggs taken at Iron Gate over 15,800,000 annually, and 19% of the quantity up to 15,800,000. The State has *not* agreed to bear any costs with respect to (1) 81% of the king salmon eggs up to 15,800,000 annually; or (2) species other than king salmon (*i.e.*, silver salmon and steelhead trout). (We believe that there is no disagreement among the parties about the extent of this voluntary undertaking by the State.)

The costs that we have agreed to bear for a portion of only the king salmon merely continues our historical assumption of

rehearing, the Commission was sharply divided on this issue.[10]

One important factor about the fishery facilities is not in apparent dispute, however (App. A at 13A):

> [T]he evidence clearly establishes that construction and operation of the fish hatchery and related facilities, whether of the extent specified in the Department's petition or of the more limited capacity called for in the stipulation agreements, will not render the Iron Gate project economically infeasible.

In a footnote to the foregoing sentence, the Commission explains (App. A at 13A n.15):

> Although suitable regulation of the river flow could have been achieved through operating Copco No. 1 and Copco No. 2 as steady flow plants rather than as peak-load facilities and the Commission could have directed Licensee so to modify

such costs for loss of spawning grounds above Copco Nos. 1 and 2, dams which were constructed before the Federal Power Act. It has nothing at all to do with Iron Gate Dam.

[10]Significantly, although all five Commissioners joined in the original opinion, they divided as follows in the opinion on rehearing: Commissioners Swidler and Woodward joined in the opinion restating the reasons for imposing 20% of the operation and maintenance costs for all fishery facilities on the Department. Commissioner O'Connor concurred in the result only, but without opinion or explanation. Commissioners Morgan and Ross, each dissenting in part and each filing a separate statement, disagreed with the Commission's decision to impose a part of operation and maintenance costs upon the State without its consent. The dissenting Commissioners made clear that they had joined in the original opinion assigning 20% of the operation and maintenance costs to the State solely upon their belief, *proven to be mistaken upon petition for rehearing*, that the State had agreed to bear 19% of those costs, which figure was simply rounded to 20%. As we have just noted (note 9 *supra*), the 19% figure relates to a portion of the king salmon species only. (App. B. at 43A-61A.)

its operations, this would have resulted in a loss of one-half of the 56,000 kw generating capacity of those plants. As noted earlier, Licensee has installed 18,000 kw capacity at the Iron Gate Development. At $210 per kw, the average cost given by Licensee for its hydroelectric facilities, the loss of 28,000 kw would have cost it $5,880,000.

Second Round: Proceedings Before the Court of Appeals (App. C, 1963-1964).

Both the Department and Licensee petitioned the Ninth Circuit to review the Commission's decision. That court made the following decision (App. C):

As to the fish trapping and egg collecting facilities: The court held that the Department had agreed to bear all operation and maintenance costs by its 1959 agreement with Licensee and that the Commission could not without good reason disregard the contract (App. C at 75A-77A). However, the court remanded to the Commission, so that it could consider evidence that would justify the Commission's decision to allocate such costs to Licensee in disregard of the 1959 agreement (App. C at 80A-81A).

As to the fish hatchery facilities: The court sustained the Commission's decision requiring Licensee to bear all construction costs but to reimburse the Department for only 80 per cent of operation and maintenance costs (App. C at 78A-80A). This latter 80 per cent-reimbursement provision was sustained solely upon one of the three grounds stated by the Commission—the ground that the record "suggests" that Iron Gate Dam (together with the fishery facilities) would enhance the fishery resource.

As to the reimbursement for the operation and maintenance costs for the hatchery facilities, the court made this significant observation: The Commission's order is unclear whether Licensee is to reimburse the Department (a) for the operation and maintenance costs for 80 per cent of full capacity operation, not to exceed actual costs, or (b) only for 80 per cent of the actual operation and maintenance costs. In other words, if the Department operates the hatchery at 80 per cent of capacity, does Licensee reimburse it (a) for all operation and maintenance costs or (b) only for 80 per cent of that 80 per cent? The court presumed the former (*i.e.*, clarification (a)) (App. C at 80A). The remand permitted the Commission to clarify its order on this point (App. C at 81A).

The State filed a petition for writ of certiorari to review that decision, which was opposed by Licensee and the Commission primarily upon the ground that the case was not ripe for review because of the further proceedings to be conducted by the Commission under the remand (No. 648, October Term 1964). Certiorari was denied without opinion. *Department of Fish and Game of California v. FPC*, 379 U.S. 969 (1965).

Third Round: Proceedings Before the Commission (Apps. D and E, 1965).

On remand, the Commission in its initial opinion (App. D) and opinion denying rehearing (App. E) did the following essentially:

As to the fish trapping and egg collecting facilities: The court, said the Commission, construed the 1959 agreement as freeing Licensee from any obligation to pay for operation and maintenance costs for these facilities, and "there is in actuality nothing more

for the Commission to do" (App. E at 89A). The Commission did not physically amend the article requiring Licensee to reimburse the Department for 80 per cent of those costs.

As to the fish hatchery facilities: The Commission clarified its order, as permitted by the court (App. C at 81A). It stated that Licensee shall reimburse the Department "for 80 percent of the cost of actual operation and maintenance whether at full capacity or a lesser capacity" (App. D at 84A).

Fourth Round: Proceedings Before the Court of Appeals (App. F, 1965-1966).

The Department petitioned the Ninth Circuit to review all the Commission's decisions, and Licensee intervened. On motion, the court affirmed the 1965 orders of the Commission and dismissed as to the 1963 orders of the Commission (App. F. at 96A-97A).

The court itself modified the Commission's order to conform with the decisions of the court and the Commission, so that it now reads (App. F at 101A):

> . . . Licensee shall reimburse the State of California Department of Fish and Game for 80 percent of the combined annual cost of actual operation and maintenance whether at full capacity or a lesser capacity of the [fish hatchery] facilities and appurtenances constructed pursuant to Article 49. . . .[11]

This makes clear that "if the Department again seeks certiorari, there will be no doubt as to the finality of our own disposition of the proceedings" [*ibid.*].

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[11]Bracketed words added. Article 49 provides for the construction of the fish hatchery facilities.

Reasons for Granting the Writ.

The basic question presented herein is an important public issue in the administration of the Federal Power Act that has not been and should now be settled by the United States Supreme Court. There are three reasons:

First: This issue involves a key section of the Federal Power Act—section 10(a)—that both the Commission and the Ninth Circuit have erroneously construed.

Section 10(a) of the Federal Power Act requires any project licensed by the Commission to be best adapted to a comprehensive plan for improving or developing the waterway, including beneficial public uses, such as recreation. The section also provides that the Commission can require modification of the project plan to secure comprehensive development. It is pursuant to this basic concept of the act that the Commission requires the construction, operation, and maintenance of fishery facilities by its licensees (App. A at 8A-9A).

In this case, the Commission has required fishery facilities of a specified size, but the Commission and the Ninth Circuit have permitted Licensee to reimburse the Department for only 80 per cent of the operation and maintenance costs for the hatchery facilities. The Commission cannot require the Department, nor any person other than Licensee, to bear the remaining 20 per cent. The Commission can legally order only its licensee to pay the costs of such facilities. To the extent that it has not done so, the Commission has failed to obey the key statutory command of Congress in section 10(a) and permitted Licensee to use the public waters without providing comprehensive development. *Cf., Scenic Hudson Preservation Conf. v. FPC*, 354 F. 2d 608 (2d Civ. 1965), *cert. denied sub nom. Consoli-*

dated Edison Co. of N.Y., Inc. v. Scenic Hudson Preservation Conf., 384 U.S. 941 (1966).

Licensee has sought and been granted the valuable privilege of using public resources for its private gain. Protection, development, and improvement of those resources—important aspects of any comprehensive development plan—are simply part of the price that Licensee must pay for that privilege.[12] The Commission and the Ninth Circuit would relieve Licensee of a part of that burden and saddle the people of the State of California with those costs—if they are paid at all.[13] This is morally wrong as well as legally in error.

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[12]When the Ninth Circuit sustained the Commission's leaving 20% of the operation and maintenance costs of the hatchery to the Department, it did so solely upon the ground of a purported enhancement of the fishery resource that the Commission said the record "suggests" would be achieved by Iron Gate (App. C at 79A-80A). The court presumed that if the hatchery were operated by the Department at 80% of capacity, then Licensee would reimburse the Department for all costs of operation and maintenance at 80% capacity (*id.* at 80A).

To the contrary, the Commission clarified its order to mean that Licensee reimburse the Department for 80% of operation and maintenance costs at whatever level of capacity the hatchery is operated (App. D at 84A). This means that the Commission intended that the Department bear 20% of operation and maintenance costs of the hatchery at any level of operation, although that level would not theoretically, in anybody's view, provide or even "suggest" any enhancement of the fishery resource. Thus, the Commission has conceptually undercut the purported enahancement, which is the sole basis on which the Ninth Circuit sustained that portion of the Commission's decision (see App. C at 80A).

[13]Both the Commission and the Ninth Circuit say that the Commission has not ordered the Department to pay anything; it has merely ordered Licensee to pay 80% (App. C at 78A; App. E at 88A). This is semantic sophistry. The Department was in effect given the choice of (a) paying 20% or (b) not operating or maintaining the fish hatchery facilities at all. This was the hard choice of (a) spending the money here, so that it would not then be available for use elsewhere or (b) losing about half the anadromous fish resource that would normally spawn above Iron Gate. That we chose the former is irrelevant. Neither the Commission nor the court could legally put that choice to the Department.

Second: This issue is manifestly of great importance in the administration of the Federal Power Act in all states in which anadromous fish and other wildlife thrive.

The Klamath River is "America's finest steelhead and salmon fishing stream." [R. (v. 1) 106-07.]

In California, these fish thrive in numerous other streams on which the Commission may license power dams.[14] This is equally true in other states, particularly Oregon and Washington (both within the geographical boundaries of the Court of Appeals for the Ninth Circuit). These states have always urged the Commission to make adequate provision for anadromous fish.[15]

Third: This issue is likely to recur in the future with reference to recreational and fishery facilities at projects the Commission may hereafter license.

On four different occasions in just the past nine months, the Commission has re-emphasized the attention it will give to recreational and fishery facilities:

In December 1965, the Commission added new section 2.7 to title 18 of the Code of Federal Regulations to provide for "recreational development at licensed proj-

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[14]The Department estimates that the historical average annual spawning runs of king salmon in the Klamath River system total about 175,000 fish, in the Eel River system about 100,000 fish, and in the Sacramento River system about 400,000 fish.

Numerous undeveloped power sites on rivers in California supporting anadromous fish are included in an open file report: United States Department of the Interior, Geological Survey, *Gross Theoretical Water Power, Developed and Undeveloped, State of California* 18-28 (1964).

[15]See, *e.g.*, FPC v. Oregon, 349 U.S. 435 (1955); State of Washington Dept. of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

ects" [30 Fed. Reg. 16197-98 (December 29, 1965)]. Its purpose is to provide additional recreational facilities to meet the "dramatic increase in public utilization of outdoor recreation opportunity during the 20 year period since World War II" [30 Fed. Reg. 16197]. To permit the project to include additional lands for recreational purposes, the provisions for Exhibit "K" to license applications, specified in section 4.41 of title 18, were also amended at the same time [30 Fed. Reg. 16198-99 (December 29, 1965)].

In June 1966, the Commission again amended section 4.41 of title 18 of the Code of Federal Regulations to require an Exhibit "S" to license applications for proposed projects of more than 2,000 horsepower installed capacity [31 Fed. Reg. 8779-81 (June 24, 1966)]. That exhibit must show, *inter alia,* "proposals for measures considered necessary to conserve and, if practicable, to *enhance* fish and wildlife resources affected by the project" [31 Fed. Reg. at 8780 (emphasis added)]. In accomplishing this, the exhibit must describe the "facilities or developments as may be necessary for the protection, conservation, *improvement* and mitigation of losses of fish and wildlife resources *in accordance with section 10(a) of the Act,* and cost estimates for such facilities and developments" [*ibid.* (emphases added)].

In August 1966, the Commission proposed to amend section 131.6 of title 18 of the Code of Federal Regulations to require an Exhibit "S" to license applications for proposed projects with 2,000 horsepower installed capacity or less [31 Fed. Reg. 10582-83 (August 6, 1966)]. That exhibit would show, *inter alia,* "proposals for measures considered necessary to conserve and, if possible, to *enhance* fish and wildlife resources affected

by the project" [31 Fed. Reg. at 10582 (emphasis added)]. It must also show such "facilities or developments as may be necessary for the protection, conservation, *improvement* and mitigation of losses of fish and wildlife resources *in accordance with section 10(a) of the Act,* and cost estimates for such facilities and developments" [31 Fed. Reg. at 10582-83 (emphasis added)].

In July 1966, the Commission also proposed to amend the Uniform System of Accounts for licensed projects to add separate provisions for "fish, recreation and wildlife facilities" [31 Fed. Reg. 9877-78 (July 21, 1966)].

Concomitantly, the Fish and Wildlife Service of the Department of the Interior has proposed new rules [31 Fed. Reg. 8130-31 (June 9, 1966)] under the Anadromous Fish Act of 1965 [79 Stat. 1125, 16 U.S.C. § 757a-f (1965 Supp.)] for the "conservation, development and *enhancement* of the commercial and sport anadromous fisheries resources of the Nation and fishes of the Great Lakes which ascend streams to spawn" [31 Fed. Reg. at 8130 (emphasis added)].

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should issue to the Court of Appeals for the Ninth Circuit for review of the basic question presented by this petition and of the three subsidiary questions also presented.

Dated: August 29, 1966.

Respectfully submitted,

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BURTON J. GINDLER,
Deputy Attorney General,

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1966

DEPARTMENT OF FISH AND GAME of the STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO.,

Respondents.

Appendixes to
Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX A.

[29 F.P.C. 478.]

OPINION NO. 381
PACIFIC POWER & LIGHT COMPANY,
PROJECT NO. 2082

Opinion and Order on Petition to Require Licensee to Construct, Operate, and Maintain a Fish Hatchery, Amending License, and Directing Revised Filings

(Issued March 14, 1963)*

*Initial decision appears on p. 487. Opinion 381-A, issued August 19, 1963, 30 FPC [499].

Commission *Requires* Licensee to Construct Fish Hatchery at Its Iron Gate Dam to Compensate for Spawning Areas Rendered Inaccessible by Dam's Construction. P. 482.

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Woodward, *Commissioner:*

This proceeding arose before the Commission on a petition filed August 21, 1961, by the State of California, acting by and through its Department of Fish and Game (Department), requesting that the Commission require Pacific Power & Light Company (Licensee), licensee for Project No. 2082,[1] to erect and maintain a fish hatchery and appurtenant facilities, pursuant to Article 49 of the license, to continue the normal runs of salmon and steelhead trout which have been displaced by Licensee's construction of its Iron Gate Development on the Klamath River in northern California. Licensee answered the petition on September 13, 1961, by denying the need for a hatchery or other fishery facilities for the purpose stated, or that it should be required to construct or maintain such facilities. Pursuant to order of the Commission, a hearing was held in San Francisco, California during June 1962. The parties' arguments were consistent with their pleadings, the Department presenting testimony of fish biologists

[1]By orders issued June 16, 1961, 25 FPC 1154, 1156, the Commission approved a merger between Licensee and The California Oregon Power Company (COPCO), Licensee being the surviving corporation. Pacific Power & Light Company is subject to all conditions of the licenses previously issued to COPCO, which includes Project No. 2082. The license for the project expires February 28, 2006.

regarding the present and anticipated deleterious effects to the Iron Gate Development to support its contention that the hatchery is vital to the preservation of the fishery resource, while Licensee claimed that the evidence as so presented and as contradicted by testimony of its own biologist fails to establish that the existing resource will not adequately be maintained without the hatchery. The staff of the Commission adopted a position supporting the need for the hatchery and its construction by Licensee but proposed that the Department and Licensee share equally in the costs of operation and maintenance.

On November 14, 1962, the presiding examiner issued his initial, or recommended, decision (*infra*) in which he determined that Licensee should be required to construct a fish hatchery facility at its expense to replace the natural spawning grounds eliminated by Iron Gate Dam, but that the cost of operation and maintenance of the hatchery and of the other appurtenant facilities thereafter should be borne by the State of California. Exceptions to the decision have been filed by each of the three parties, *i.e.*, Licensee, the Department, and the Commission's staff,[2] and oral argument was held before the Commission on January 24, 1963, at the Department's request. Pursuant to leave granted at the conclusion of the oral argument, Licensee and the Department have submitted comments on statements of fact made by opposing counsel, which memoranda have been considered by the Commission.

In order to place the proceeding in its proper context, a brief recitation of the underlying factual back-

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California Senate Fact Finding Committee on Natural Resources were present at the hearing but did not enter formal appearances nor did they participate therein.

ground is desirable. As noted in the examiner's decision, the present controversy is the latest episode in a protracted dispute between the Department and Licensee dating from 1918 and 1925 when the two hydroelectric plants known as Copco No. 1 and Copco No. 2 were constructed on the Klamath River in California a few miles below the Oregon border.[3] These dams were too high to permit fish migrations and Licensee therefore constructed a hatchery a short distance below the dams on Fall Creek, a tributary of the Klamath River, conveying the facility to the State in 1919. In 1925 fish trapping facilities and an egg collecting station were constructed and similarly conveyed to the State. The Fall Creek hatchery was operated and maintained until 1948 when it was discontinued as uneconomical. Use of the trapping and egg collecting facilities was continued until the construction of the Iron Gate Development, which includes new facilities for these purposes.

Operation of the existing hydroelectric plants as peak-loaded facilities with alternate storage and release of large volumes of water produced severe changes in the downstream river level and eventually led to the filing of a suit by the State of California in 1950 to enjoin the abnormal fluctuations as a continuing public nuisance. Following a course of extended but inconclusive litigation, Licensee filed an application in January 1957 for amendment of the license to authorize construction of the Iron Gate Development, approximately eight miles below Copco No. 2, the primary purpose being to even out the flows below the Copco plants. On July 27, 1958, Licensee and the Department entered into an agreement

[3]The Klamath River in California and Oregon was held to be a navigable water in the United States in *The California Oregon Power Company*, 13 FPC 1, 12.

under which the Department withdrew its informal objections to the proposed Iron Gate Development and acknowledged that the construction thereof would serve to reregulate the flow of the Klamath River in a manner satisfactory to the State. Licensee agreed that it would construct the permanent fish trapping and egg collecting facilities which are now a part of the development. The necessity for the construction of a fish hatchery at Iron Gate expressly was preserved for future determination, Article 6(b) of the agreement providing "* * * that the right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping and egg-collecting facilities. . . ." The agreement was made a part of the record in the 1959 proceeding and was relied on by the examiner in denying a finding proposed by the Department implying a determination that the hatchery was to be constructed as a condition of the license.[4] No exceptions were filed to the examiner's approval of the application for construction of the Iron Gate Development, and on January 13, 1960, the decision was adopted by order of the Commission.[5]

On March 27, 1961, the Commission, pursuant to application of Licensee, issued an order further amending the license to authorize certain requested changes in design and in the timing of construction.[6] Articles 49 and 50, as presently constituted,[7] were included in

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[4]23 FPC 61, 68.

[5]*The California Oregon Power Company*, 23 FPC 59.

[6]*Ibid.*, 25 FPC 579.

[7]Analogous provisions were contained as Articles 42 and 43 in the 1960 license amendment, accepted by the Licensee on

(This footnote is continued on the next page)

the license at that time. These Articles provide as follows:

Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

Article 50. The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near and downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

Construction of the Iron Gate Development, including the fish trapping and egg collecting station, was undertaken in February 1960 and completed in January 1962 at a claimed cost of approximately 8.4 million dollars. In conformity with the license, an 18,000-

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January 26, 1960. Article 43, which was similar to present Article 49, was incorporated after consultation with the U.S. Fish and Wildlife Service and the Department, and in line with a modification suggested by Licensee in a letter to the Commission filed September 9, 1957. The March 1961 amendments were accepted by the Licensee on April 10, 1961.

kilowatt generator connected to a 25,000-horsepower turbine has been installed and is in operation.

One of the issues under dispute in the hearing involved the size of the hatchery as proposed by the Department. At the examiner's request a meeting was held between Licensee and the Department after conclusion of the hearing at which the parties signed a stipulation agreeing to the specifications of the hatchery facilities which would be built if required by the Commission. The stipulation, filed August 17, 1962, is without prejudice to Licensee's position that there is no need for a hatchery and that, if a hatchery is found to be required, it is not liable for the costs associated with the construction, operation, or maintenance thereof. Construction of the fishery facilities as originally proposed by the Department in 1961 was estimated to cost $1,003,020. Although no computations have been made as to the cost of the stipulated facilities, the fact that the total weight of fish to be produced has been lowered in the stipulation from 121,500 pounds to 50,000 pounds per year indicates that the cost of construction will be substantially less than the million dollar figure. The staff has estimated that annual operating and maintenance costs will be reduced from $95,256 which would have been needed to run the proposed facility to approximately $54,278 for those stipulated in the agreement.

Upon our consideration of the record and the oral arguments presented by counsel, we are of the opinion that the Licensee properly should be required to construct a hatchery of the capacity provided in the stipulation to compensate for the spawning areas which have been rendered inaccessible by the dam's construc-

tion. The costs of operation and maintenance of the fish facilities, however, should not, we believe, be assessed wholly against the Licensee. Instead, and assuming that the Department will be the operating agency, we shall direct Licensee to reimburse the Department for 80 percent of the annual expenses incurred in the operation and maintenance.

There is no question that the Commission has the power to require construction of the requested facilities by the Licensee. The question of jurisdiction over Project No. 2082 was considered in the original *California Oregon Power Company* case, 13 FPC 1,[8] and was determined to vest in the Commission generally under Part I of the Federal Power Act on the ground of navigability of the Klamath River. In addition, the Commission found that the project would utilize surplus water from the Link River Dam, a "Government dam" within the definition of Section 3(10) of the Act, and therefore was subject to our licensing authority under Section 4(e). Inclusion of the Iron Gate Development with the previously constructed developments was affirmed by the Commission in its January 1960 order. It is clear that the Commission may require the construction, maintenance, and operation of fishways by a licensee. Section 10(a) of the Act requires the Commission, before issuing a license for hydroelectric development, to find that the project shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan of development of the water resources for power and all other beneficial public uses.

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[8]Opinion No. 266, 13 FPC 1, rehearing denied March 29, 1954, supplemental Opinion No. 266—A, 15 FPC 14, affirmed 239 F. 2d 426 (CADC, 1956).

This provision has been interpreted to embrace the conservation, preservation, and enhancement of anadromous fish resources, and the Commission, on a number of occasions, has directed the inclusion of fish facilities in licensed projects where appropriate.[9] Licensee has conceded that the Commission has the power and obligation in the present proceeding ". . . to take such measures as are reasonably necessary to preserve fish and wildlife."

The factual evidence presented by the Department is amply covered in the examiner's decision and need not be repeated herein. Although Licensee maintained that the Department has not established the need for a hatchery at Iron Gate, and questioned the accuracy of the Department's estimates as to the number of fish formerly spawning above the site of the Development, it admitted that some spawning and rearing areas have been eliminated by the Dam's construction. Licensee argued, however, that normal runs will be sustained by the spawning grounds located below Iron Gate. The examiner concluded that while the Department's estimate that 57.1 percent of the fish runs at Klamathon Racks spawned above the Iron Gate site was open to question, the estimates were the best available and do support the necessity for additional fishery facilities at Iron Gate to replace the natural hatching and incubation proc-

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[9] *City of Tacoma, Washington,* 10 FPC 424 (1951); *Portland General Electric Company,* 10 FPC 445 (1951); *Idaho Power Company,* 14 FPC 55 (1955); *City of Eugene, Oregon,* 14 FPC 408 (1955); *Puget Sound Power and Light Company,* 15 FPC 1496 (1956); *Portland General Electric Company,* 17 FPC 58 (1957); *Puget Sound Power and Light Company, et al.,* Projects Nos. 943 and 2114, Order Directing Modifications in Rock Island Dam Fishways, issued October 24, 1962, 28 FPC 718.

ess that would normally have occurred in the lost spawning areas. He also found no apparent evidence in the record to support Licensee's assertion that the fish would turn back on reaching the Dam and spawn downstream.

Licensee has continued in its exceptions to assert that there is no evidence to support the finding that (1) there are not sufficient spawning grounds elsewhere in the river to support the runs which might have spawned in the eliminated area, or (2) if there are such spawning grounds, they will not be used by the fish. Attacking the Department's estimates of the number of fish formerly spawning above Iron Gate as "completely speculative," it argues that without more definite evidence the need for a hatchery has not been established with adequate certainty. It also contends that the improvement of conditions for anadromous fish runs in the river and of the recreational potential[10] in the upper Klamath area resulting from the construction of Iron Gate Dam more than satisfy the obligations of Licensee and its ratepayers to the public, stating:

> In contrast to the public benefit already conferred by the company and its ratepayers, the benefit which might be realized by the construction of further fishery facilities is insignificant. We have already shown that there is no substantial evidence in the record to support a need for a hatchery. If no need can be shown the prospect for benefit is obviously small. In the face of these circumstances, it is apparent that the point of diminishing return for investment of Licensee's dol-

[10]A reservoir of approximately 1,200 surface acres has been created which is available to the public.

lars in fishery facilities in the upper Klamath has long since been reached. The Licensee cannot in good conscience be required to pay more.

In support of its position that further expenditures should not be required of it for the development of natural resources, Licensee has cited certain of the past decisions of the Commission. A reading of those cases will reveal, however, that the Commission thoroughly considered on each occasion the effect of the proposed development on the anadromous fish population and found either a negligible result or made suitable provision to insure the perpetuation of the fish resource. Thus, in the *Portland* case,[11] the Commission rejected a request for fish facilities more extensive than those proposed in the application on a finding that the Deschutes River above the Pelton project site ". . . is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is relatively remote" The cost of fish facilities installed at the project may amount to over five million dollars out of a total cost of approximately $20,575,000. In *City of Tacoma*[12] the Commission directed the licensee to install various fish facilities at an estimated initial cost of $7,100,000. The ultimate cost of facilities and improvements for the fishery resources program was expected to approximate $9,465,000 with an annual cost of operation and maintenance estimated at $610,000. It may be noted that the licensee proposed

[11]10 FPC 445 at 450. The decision of the Court of Appeals vacating the Commission's order, 211 F. 2d 347, was in turn reversed in *F.P.C. v. Oregon*, 349 U.S. 435, 75 S. Ct. 832.

[12]10 FPC 424, 428-432, 436-439, affirmed 207 F. 2d 391, *cert.* denied 347 U.S. 936.

to construct and operate extensive fish hatchery facilities as a complement to the other fish protection measures. In *City of Eugene*,[13] the provisions in a conservation agreement between the licensee and the State Game Commission were deemed adequate to provide protection for the fishery resource in view of evidence that anadromous and fresh water fish did not ascend the river to the project area. Finally, in the *Idaho* case,[14] a provision was included for the licensee's construction of fishery facilities in recognition that the proposed Oxbow, low Hells Canyon and Brownlee developments on the Snake River ". . . would adversely affect the fish and wildlife resources of the area, and particularly the anadromous fish." The decision shows that an expenditure of about five million dollars was anticipated for the fishery program, exclusive of a low barrier dam which might be needed.

The cases relied upon by Licensee not only fail to afford support for its claim, but serve to demonstrate the importance attributed by the Commission to the preservation of existing fish resources in the comprehensive development of the nation's waterways. We agree with the examiner that without a hatchery there can be no assurance that the fishery resource will be preserved and maintained at a level approximately equal to that which existed prior to construction of the Iron Gate Development. As brought out in the record, Licensee could have applied for authorization to change its method of operation of the Copco plants, thereby obviating the necessity for the reregulating facility

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[13]14 FPC 408, 413, 418.

[14]14 FPC 55, 63, 77, affirmed 237 F. 2d 777, *cert.* denied 353 U.S. 924.

and leaving the spawning areas undiminished. For purely economic reasons it chose not to do so, and has created an impassable barrier which the evidence indicates will have a deleterious effect on the pre-existing fish population. Moreover, the evidence clearly establishes that construction and operation of the fish hatchery and related facilities, whether of the extent specified in the Department's petition or of the more limited capacity called for in the stipulation agreements, will not render the Iron Gate project economically infeasible.[15]

Licensee has excepted to a statement of the examiner tying the hatchery to the Article 50 facilities built under the terms of the July 1959 agreement and since conveyed to the State as elements necessary to a complete fishery facility. In view of the fact that these facilities were constructed solely to replace the trapping and egg collecting station formerly situated at Fall Creek, the argument of Licensee that its assumption of the cost of their construction should not influence the determination regarding responsibility for the hatchery construction costs is well taken and is accepted.

Since Licensee has created the situation which necessitates the fish hatchery, it is no more than reasonable to require that it pay the cost of construction thereof. For this same reason, it must also be required to pay

[15]Although suitable regulation of the river flow could have been achieved through operating Copco No. 1 and Copco No. 2 as steady flow plants rather than as peak-load facilities and the Commission could have directed Licensee so to modify its operations, this would have resulted in a loss of one-half of the 56,000 kw generating capacity of those plants. As noted earlier, Licensee has installed 18,000 kw capacity at the Iron Gate Development. At $210 per kw, the average cost given by Licensee for its hydroelectric facilities, the loss of 28,000 kw would have cost it $5,880,000.

for a substantial portion of the costs involved in the operation and maintenance of the facility. Only in this manner will the taxpayers of the State of California be saved from the imposition of a burden in the form of annual operating and maintenance expenses arising from an election of Licensee in a situation where an alternative course of action could have been selected by it which would not have necessitated the hatchery facilities. Licensee's argument that it should not be required to pay the cost of operation and maintenance on the basis of Section 5938 of the California Fish and Game Code and of the State policy as expressed therein is unavailing, as is its contention that the question as to who shall pay these expenses ". . . is a matter between the State and the Company." Whether the State Legislature intended that the statutory provision would be applicable to federally licensed projects or, as alleged by the Department, the section refers only to hatcheries constructed pursuant to State requirement, is wholly immaterial since the Federal government, in its enactment of the Federal Power Act, has occupied the entire field of licensing power projects on navigable and interstate water, to the exclusion of concomitant state jurisdiction.[16] That no residual or supplementary control with respect to the determination of necessary provisions for maintenance of the fish resource has been left to the states was indicated in the passage of the Fish and Wildlife Coordination Act,[17] which contemplates that power companies operating under a federal license would be required to

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[16] *State of Washington Dept. of Game v. F.P.C.*, 207 F. 2d 391; *F.P.C. v. Oregon*, 349 U.S. 435.

[17] 16 U.S.C. 661, *et seq.*

make adequate provision for fish conservation as a condition of the license.

We are not convinced, however, that Licensee should be required to pay the full costs involved in operating and maintaining the hatchery and related facilities.[18] Some sharing in costs already is envisioned in Item No. 1(c) of the stipulation as agreed to by the parties. Reregulation in the flow of the Klamath River by Iron Gate Dam will not only restore the downstream reaches to the condition which existed prior to 1918 but will also serve to diminish or possibly even eliminate destructive natural fluctuations in the river level, particularly in those reaches contiguous to the Development. To this extent, the river and the enjoyment thereof by the people of the State of California will be enhanced over its original condition. Availability of the Iron Gate Reservoir to the public for lake fishing, boating, swimming, and other recreational activities likewise indicates that the advantages to be derived from Licensee's election to construct the Iron Gate Development are not all one-sided. In our opinion, an equitable division of costs will be achieved, commensurate with

[18]Both the Department's brief and that of the Licensee include the question of responsibility for the costs of operation and maintenance of the fish trapping and egg collecting station among the issues to be decided herein. Licensee's statement that the Department undertook to operate these facilities and indictating that the matter is settled is contradicted in the exchange of correspondence between Licensee and the Department wherein the latter was permitted to operate the facilities temporarily in full recognition by both parties that such action was not determinative of the issue as to their continued operation and maintenance. The presentations made by the parties do not distinguish between the facilities on this point nor do they in any way indicate that the matter is now ripe for decision. Our determination herein with respect to operation and maintenance of the hatchery facility, accordingly, is also dispositive of this issue.

the benefits attained, if Licensee is required to construct the hatchery and, again assuming State operation, to pay the State for 80 percent of the yearly costs of operation and maintenance of all fishery facilities at the Development. Although we are unable to order the State of California to assume the remaining 20 percent of the operation and maintenance expenses, we believe that the apportionment of costs as herein set out is reasonable and will be so considered by the State agency. Apportionment of the costs in this manner also will provide the State with a financial incentive to assure economy of operation of the fishery facilities. Moreover, while no major difficulties are anticipated under the arrangement, we shall retain continuing jurisdiction to settle possible disputes which may arise over the determination of the proper annual amount to be charged Licensee by the State.

The Commission further finds:

(1) Iron Gate Development is a unit of Project No. 2082, licensed to Pacific Power & Light Company, and is situated on the Klamath River, a navigable water of the United States as previously found by the Commission.

(2) Iron Gate Development has been constructed by Pacific Power & Light Company and is now in operation.

(3) Iron Gate Development blocks and prevents the seasonal migration of anadromous fish to approximately 16 miles of spawning gravels in the Klamath River and its tributaries between the Iron Gate Development and the Copco No. 1 and Copco No. 2 hydroelectric plants.

(4) To compensate for the loss of the spawning areas described in Finding (3) hereof, a fish hatchery should be constructed, operated, and maintained at Iron Gate Development of a size and capacity to annually hatch and rear 200,000 yearling steelhead trout to a total weight not to exceed 20,000 pounds, 75,000 yearling silver salmon to a total weight not to exceed 5,000 pounds, 6,000,000 fingerling king salmon to a total weight not to exceed 20,000 pounds, and 5,500,000 king salmon swim-up fry; provided, not more than 12,800,000 king salmon eggs should be required to be accommodated in any year at the Iron Gate hatchery facility.

(5) Licensee has constructed a fish trapping and egg collecting station at the Iron Gate Development of sufficient size and capacity to obtain the eggs for supplying a hatchery of the aforesaid size and capacity.

(6) Iron Gate Development will be economically and financially feasible if the aforesaid fish facilities are constructed, operated, and maintained in the manner as hereinafter provided.

(7) The construction, operation, and maintenance of a fish hatchery, as hereinafter provided, of the aforesaid size and capacity is necessary in the public interest to sustain the anadromous fishery resource of the upper Klamath River at a level approximately equal to that which existed prior to the construction of the Iron Gate Development.

The Commission orders:

(A) The license for Project No. 2082, as amended, is further amended to provide as follows:

Article 49. The Licensee shall construct or arrange for the construction, at its expense, of a fish hatchery

at Iron Gate Development, together with supplemental structures and ancillary equipment as detailed in the agreement filed with the Commission on August 17, 1962, by the State of California Department of Fish and Game and the Licensee, of a size and capacity to annually hatch and rear 200,000 yearling steelhead trout to a total weight not to exceed 20,000 pounds, 75,000 yearling silver salmon to a total weight not to exceed 5,000 pounds, 6,000,000 fingerling king salmon to a total weight not to exceed 20,000 pounds, and 5,500,000 king salmon swim-up fry; provided not more than 12,800,000 king salmon eggs shall be required to be accommodated in any year. Plans for the aforesaid facility shall be prepared by Licensee, in cooperation with the State of California Department of Fish and Game and the U.S. Fish and Wildlife Service, Department of the Interior, and shall be submitted to the Commission for approval within 60 days of the issuance of this order. The facility shall be constructed within one year from the date of approval of the plans by the Commission.

Article 50. Licensee shall reimburse the State of California Department of Fish and Game for 80 percent of the combined annual cost of operation and maintenance of the facilities and appurtenances constructed pursuant to Article 49 and of the permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances constructed at Iron Gate Dam. Should Licensee and the State of California Department of Fish and Game fail to agree on the amount to be paid by the Licensee for this purpose, the Commission reserves the right to determine the amount of such annual payment, after notice and opportunity for hearing.

(B) Pending completion of the aforesaid facility, Licensee shall take all reasonable measures to provide for maintenance of the Klamath River fishery resource.

(C) To the extent not inconsistent herewith, the decision of the examiner is affirmed.

(D) All exceptions to the decision of the examiner not herein granted are hereby denied.

(E) This order amending the license for Project No. 2082 shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this order. In acknowledgment of the acceptance of this order, it shall be signed for Licensee and returned to the Commission within 60 days from the date of its issuance.

Levy, *Presiding Examiner:* This proceeding is before the Federal Power Commission by reason of a petition filed by the California Department of Fish and Game (Department) on August 21, 1961, requesting that Pacific Power and Light Company (Licensee) be required to construct, operate, and maintain a fish hatchery at its recently completed Iron Gate Dam (Project No. 2082) pursuant to Article 49 of the license.[1]

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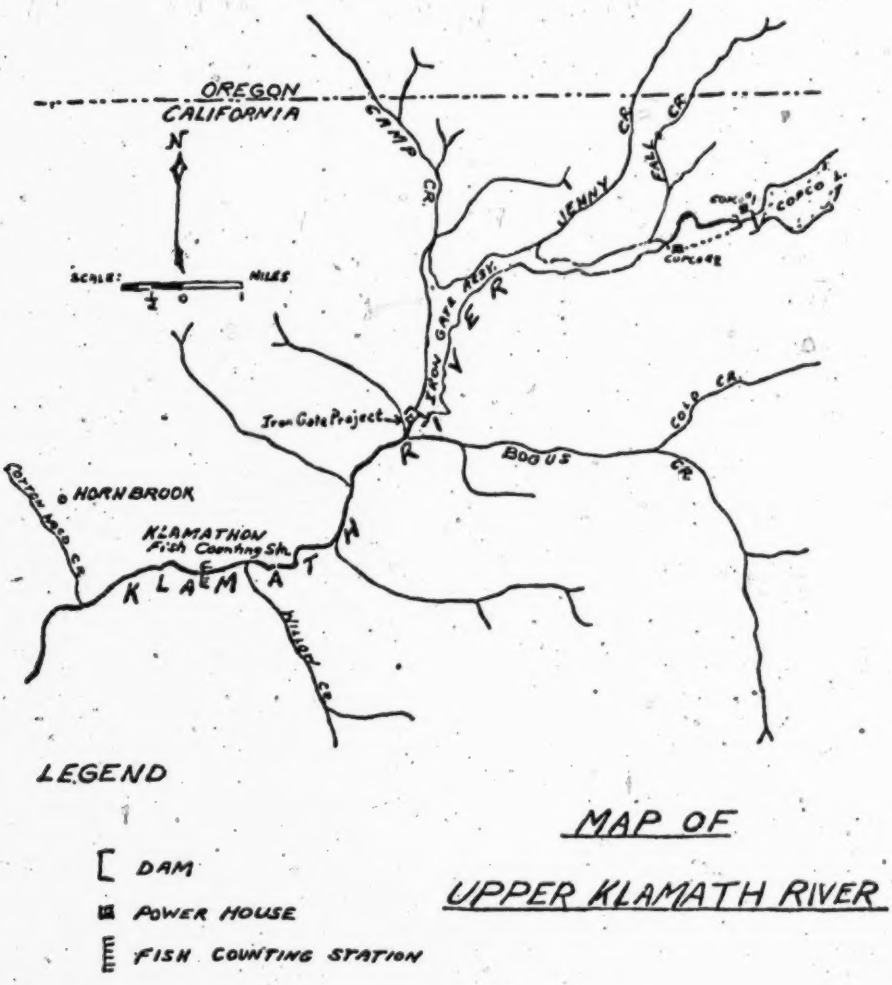
[1]Article 49 reads as follows:

Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

INITIAL DECISION

UPON PETITION BY THE STATE OF CALIFORNIA TO REQUIRE LICENSEE TO CONSTRUCT, OPERATE, AND MAINTAIN A FISH HATCHERY

(Issued November 14, 1962)



MAP OF

UPPER KLAMATH RIVER

The Licensee, in its Answer of September 13, 1961, denied the necessity for any fishery facilities to maintain normal fish runs in the Klamath River, or that it should be required to construct or maintain such facilities. On January 30, 1962, the Commission issued an Order setting the matter down for hearing and prescribing certain prehearing procedures, including the filing and exchange of prepared testimony and exhibits. After the close of the hearing, held June 4th and 5th in San Francisco, Licensee and the Department stipulated, at the request of the Presiding Examiner, to the details of fish hatchery facilities which would be built if required by the Commission. The stipulation filed August 17, 1962 (Appendix A), is without prejudice to the Licensee's position that there is no need for a fish hatchery and that, in any event, it is not liable for construction, operation, or maintenance.

Background of the Proceeding

The instant proceeding is the latest episode in an extended fishery controversy between the Department and the Licensee[2] that goes back to the construction in 1918 and 1925, of two hydroelectric plants known as Copco No. 1 and Copco No. 2 on the Klamath River in California just below the Oregon border (see Map.) In lieu of a fish ladder the Licensee constructed a fish hatchery at Fall Creek, a short distance down river and, under an agreement with the Department, conveyed the facility to the State of California in March 1919. In 1925, the Licensee constructed and conveyed to the State an egg collecting station at Klamathon some 15 miles downstream.

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[2]"Licensee" also includes, where applicable, Pacific Power and Light Company's predecessor, California Oregon Power Company (Copco).

The Fall Creek hatchery was operated and maintained by the Department until 1948 when "operations were discontinued due to the high cost of maintaining the installation and high operational cost of raising fish". (23 FPC 66) The egg collecting station was continued in operation by the Department until the construction by the Licensee of new egg collecting facilities in March 1962, pursuant to Article 50 of the Iron Gate license.[3]

The hydroelectric plants were operated to meet peak load requirements by alternately storing and releasing water with increasingly severe downstream fluctuations. The Department maintained, and the Presiding Examiner in the license proceeding found, that the fluctuating water levels ". . . have a decidedly detrimental effect on fish and aquatic life." (23 FPC 66)

In 1950 the Department filed suit to compel the Licensee to construct a regulating dam at Iron Gate. After protracted negotiations and the commencement of license[4] proceedings to authorize the construction and operation of a regulating dam, the Department and the Licensee entered into an agreement on July 27, 1959, Exhibit 62 in the license proceeding, under which the

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[3]Article 50 (25 FPC 579, 581) reads as follows:

The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

[4]The full history of the proceedings in Project No. 2082 is stated in 23 FPC 59, 62 (1960). The license was further amended at 25 FPC 579 (1961) so as to authorize changes in the design from a concrete arch dam to an earth-filled dam, the erection initially to its ultimate height, and reduction in the size of the generator from 25,000 to 18,000 kilowatts.

Department withdrew its objections to the Iron Gate development as proposed by the Applicant. The agreement provided that the Licensee would construct a dam at Iron Gate for the principal purpose of regulating the flow of water in the Klamath River, and would build fish trapping and egg collecting facilities in accordance with plans and specifications to be furnished by the Department. The necessity for the construction of a fish hatchery at Iron Gate was expressly reserved for future determination.[5] Paragraph 6(b) of the Agreement provides as follows:

> The State, the Department and the Commission shall forthwith cause to be withdrawn and dismissed all protests and interventions with respect to the pending applications of Copco before the Federal Power Commission in Project No. 2082, and before the State Water Rights Board in Application No. 17527; provided, that *the right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping and egg collecting facilities referred to in paragraph 3 thereof.* [Emphasis supplied.]

Construction of the Iron Gate facility, in a single stage rather than the two stage construction originally contemplated, was completed in January 1962 at a cost in excess of $8,000,000. Of this amount more than

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[5]The Presiding Examiner denied a request by the department for the inclusion in the findings of language which could be construed as implying a determination that fish hatchery facilities ought to be constructed as a condition of the license. (23 FPC 68, 71)

$700,000 was represented by the cost of building the fish trapping and egg collecting facilities. The Iron Gate Development as completed consists of an earthfill dam about 173 feet high with crest elevation of 2,338 feet, a concrete side channel spillway of the overflow type in the right abutment, a reservoir with normal water surface at elevation 2,328 feet and a capacity of about 58,000 acre-feet, a tunnel through the right abutment which will serve as a sluice and diversion during construction, an intake structure, a power conduit through the left abutment, a penstock, a powerhouse with one 25,000-horsepower turbine connected to an 18,000-kilowatt generator, a substation adjacent to the powerhouse, a 66 kv transmission line extending to COPCO No. 2 Switchyard, a fish ladder and fish trapping facilities complete with appurtenant facilities, and other electrical and mechanical facilities. The existing fish facilities are being operated by the Department temporarily, with the consent of the Licensee, pending determination of responsibility for operation and maintenance (See Exh. B attached to California's Reply Brief).

The Issues

The stipulation of August 17, 1962, covering the details of fish hatchery facilities, if required, leaves the following issues for determination:

1. Are additional fish rearing facilities required at Iron Gate to preserve and maintain the fishery resource at a level approximately equal to that which existed before the construction of the Iron Gate Development?

2. If so, who is responsible for construction, operation and maintenance of the fishery facilities?

The Evidence

The Department's experts, fishery biologists Skinner, Croker, Bailey, Hill, and Fraser testified in substance that the Iron Gate Development prevents access by salmon and steelhead to about 16 miles of spawning gravel between Copco Dam and Iron Gate which historically has been utilized by anadromous fish to spawn and reproduce, and that a hatchery is needed to replace these spawning areas which have been eliminated by the construction of the Iron Gate Development. Croker testified that the general trend of salmon runs above Klamathon is downward (Exh. 11-A) and that, based on live fish counts, aerial surveys, carcass and redd counts, 57.1 percent of the fish passing Klamathon spawned above Iron Gate.

Robert Macklin, the Department's Supervisor of Fish Hatcheries, proposed the construction of a fish hatchery at Iron Gate, based on runs of 15,000 king salmon at Klamathon designed to incubate, hatch, and rear annually 200,000 yearling steelhead trout, 75,000 yearling silver salmon, and 6,000,000 fingerling king salmon, to a total weight of 121,500 pounds, at an estimated construction cost of $1,003,020, and an annual operating and maintenance cost of approximately $95,256. (Exh. Nos. 6, 7, 8, 9)

J. C. Boyle, Licensee's Vice President, testified in support of the Company's position. Licensee's fishery biologist, Dr. Hamilton, conceded the loss of spawning and rearing areas eliminated by the construction of Iron Gate Dam. His proposed hatchery facilities were smaller and less costly than those proposed by the Department. (Exh. Nos. 15-18, inclusive) The facilities detailed in the stipulation (Appendix A) are also less

costly than the Department's original proposals. The total weight of all fish produced is reduced from 121,500 pounds to 50,000 pounds. The holdover of one million fingerlings for fall release is eliminated. Reductions in construction costs are effected by the substitution of rearing ponds for nursery ponds, reduction in the area required to accommodate the hatchery troughs, the number of incubation trays, and the elimination of all of the 14 nursery ponds originally proposed. The Staff estimates that annual operating and maintenance costs will be reduced from $95,256 to $54,278. (Staff br. p. 11)

Discussion

1. Licensee maintains that the Department has not established the need for a fish hatchery at Iron Gate, and questions the accuracy of its estimates as to the number of fish spawning above the Iron Gate Development. It argues that normal runs will be sustained by spawning grounds *below* Iron Gate Dam. The testimony indicates, however, that Iron Gate Dam, completed in 1961, prevents access by salmon and steelhead trout to about 16 miles of spawning gravel, thereby eliminating one of the most popular stream fishing areas in the upper Klamath River. (23 FPC, 66, 67) Licensee's fisheries biologist, Dr. Hamilton, conceded that ". . . the Iron Gate reservoir has eliminated whatever salmon and steelhead spawning areas existing between Iron Gate and COPCO Dam . . ." (Tr. 246) and that ". . . about 970 steelhead were trapped at the site this spring after the Iron Gate egg-taking station was put into operation on February 27, 1962." (Tr. 278, 286)

The historic decline of Klamath River king salmon is documented in Exhibit 11-A, the most detailed data of

record. While the accuracy of the Department's estimate that 57.1 percent of the fish runs at Klamathon spawned above Iron Gate may be questioned, these estimates are the best available and do support the necessity for additional facilities to replace the lost spawning areas above Iron Gate Dam. I conclude that facilities for the artificial propagation and the perpetuation of the anadromous fish are required at Iron Gate to preserve and maintain the fishery resource at a level approximately equal to that which existed before the construction of the Development. The question remains as to whether a hatchery is required at Iron Gate.

Pursuant to the agreement of July 27, 1959, and Article 50 of the Iron Gate license, (Project No. 2082), Licensee has constructed fish trapping and egg collecting facilities which went into operation on February 27, 1962. The Department argues that without the further construction of a hatchery, the egg collecting station is incomplete since "the eggs cannot be simply released back into the river. It is needed as a substitute for [the] natural hatching and incubation process that would normally occur above the Iron Gate Dam had the dam not been constructed." (Tr. 18) The Licensee suggests that any fish which would penetrate the river as far as the Iron Gate Dam will turn back to find suitable spawning grounds down river, and, if this does not maintain the runs, the fish can be transported downstream to other suitable spawning grounds. There is no assurance, however, or evidence that a sufficient number of anadromous fish reaching Iron Gate Dam will turn back and spawn downstream; or that they can be made to do so even if they are trapped and physically transported to downstream areas. In short, I am

unable to conclude from the evidence of record that the upper Klamath fish runs can be maintained at an equivalent level without the construction of additional fish rearing facilities. A hatchery[6] is the established method of insuring that the eggs taken from the fish at the trapping facility are properly incubated, hatched, and reared. Licensee's predecessor had constructed a fish hatchery at Fall Creek in 1919, which was operated and maintained by the Department until 1948. I concluded, therefore, that fish hatchery facilities are required to replace natural spawning eliminated by the dam and to complete the fish trapping and egg collecting station heretofore constructed at Iron Gate. Fortunately, the parties have stipulated to the nature of the hatchery facilities to be built if required. These facilities are described in Appendix A, attached hereto and made a part of this decision.

2. The construction costs of the hatchery, as detailed in the stipulation, should be paid for by the Licensee. This is consistent with the agreement between the Licensee and the Department of July 27, 1959 (Exh. 62) pursuant to which the Licensee built the fish trapping and egg collecting facilities. The hatchery will expand the egg collection station into a complete facility for the maintenance of the fishery resource of the upper Klamath River. The agreement provides (para. 3) for the conveyance of the "permanent fish trapping and egg collecting facilities" to be built by the Licensee, ". . . and title thereto, together with the land upon which they are situate . . ." to the State. Similarly,

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[6]The Department's witness, Macklin, testified that 15 hatcheries are being operated by the California Department of Fish and Game. (Tr. 145.)

the complementary hatchery should be conveyed to the State to be owned, operated, and maintained by the Department as an integrated fishery facility The cost of maintenance and operation, however, should be borne by the Department and the State which will now own, control, and operate the entire facility.

The Department argues that the 1959 agreement is not conclusive since it did not expressly agree therein to operate and maintain the fish facilities. The agreement did leave open the issue of hatchery construction and overall operation and maintenance costs. These are the issues to be resolved in this proceeding.

Operation and maintenance by the State is suggested, however, by the following considerations. Historically, the State operated and maintained the Fall Creek fish hatchery constructed by COPCO and conveyed to the State in 1919, and the fish trapping facilities at Klamathon built by COPCO and conveyed to the State in 1925. The Fall Creek hatchery was abandoned[7] by the Department in 1948 as too costly. The Iron Gate hatchery, which Licensee is now required to build under this order, will substantially replace the Fall Creek hatchery previously operated and maintained by the State.

The Fall Creek hatchery was operated and maintained by the State, as are all 15 State hatcheries, under the California Fish and Game Code. Section 5938 thereof provides in pertinent part:

> Whenever in the opinion of the commission it is impracticable, because of the height of any dam, or other conditions, to construct a fishway over

[7]After its abandonment, eggs taken at Klamathon were reared at the Department's Mount Shasta hatchery.

> or around the dam, the commission may, in lieu of the fishway, order the owner of the dam completely to equip, within a specified time, on a site to be selected by the department, a hatchery, together with dwellings for help, traps for the taking of fish, and all other equipment necessary to operate a hatchery station, according to plans and specifications furnished by the department. *After such hatchery has been constructed, the department shall operate it without further expense to the owner of the dam except as provided in Sections 5940 and 5941.* [Emphasis supplied.]

The Department argues that the Fish and Game Code of California is inapplicable to a federally licensed power project. The Federal Power Commission has the authority under the Federal Power Act, which it has exercised in appropriate circumstances, to require the construction, operation, and maintenance of fish facilities by the Licensee as a condition of the license. State law, policy, and history are, however, relevant considerations in the exercise of such power. The policy of the State of California, as set forth in its Fish and Game Code, is to share in the expense of maintaining fish runs, disrupted by the construction of hydroelectric projects, by operating and maintaining fish hatcheries constructed by the owner of the project at his own expense. This policy is not in conflict with the Federal Power Act or Commission policy. I see no good reason why it should not be followed in this proceeding.

Here the Department by agreement has obligated the Licensee to convey to the State the fish trapping and egg collecting station which it built and the Department

is now operating The fish hatchery when completed should also be conveyed to the State so that its operation can be integrated with the related fishery facilities.

State ownership and control of the Iron Gate fish facilities should carry with it responsibility for the cost of operation and maintenance. This is consistent with California law, with sound fiscal policy, and with the prior pattern on the Upper Klamath.

The Department argues that it is unfair and inequitable to burden California taxpayers with part of the costs of generating power which is distributed and sold interstate. It is not unfair, however, to require taxpayers to participate in the maintenance of a natural resource from which all benefit. The California legislature long ago decided to share in the expense of preserving fish by operating and maintaining hatcheries constructed by the owners of California dams. Moreover, the taxpayers of California also benefit from the construction of licensed power projects. The ratepayers of California and Oregon may well ask why they should be saddled in perpetuity with the unknown and escalating costs of hatcheries operated by the Department, without cost limitations, for the benefit of all citizens and taxpayers. The objective of the Federal Power Act is the maximum development of the entire water resource including power and recreation[8] as well as fish. I am therefore compelled to reject the position of the Department that the Licensee should, in addition to constructing the hatchery, defray *all* operations and maintenance expense. The history of this project and the facts in this proceeding suggest otherwise.

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[8]The Iron Gate Development has improved the recreational facilities of the upper Klamath by creating a 1,200 acre reservoir available to the public. (Tr. 181-183.)

The Staff brief is silent in respect of who is to bear the cost of operating and maintaining the egg collecting facility at Iron Gate. The Staff proposes, however, that Licensee and the State share equally in the costs of operating and maintaining the fish hatchery to be constructed at Licensee's expense. The State would continue to pay for the annual operating and maintenance expense attributable to an annual average of 3,000,000 Klamath River king salmon eggs presently hatched and reared at its Mount Shasta hatchery for release into the upper Klamath River.

Licensee and the Department oppose the Staff suggestion; Licensee on the ground that it has no obligation to pay for half the operation and that the Staff proposal is a compromise[9] "unsupported by law or reason". The Department argues that hatchery construction should not be conditioned on their acceptance of the obligation to operate and maintain the facility. I have concluded for all the reasons previously discussed that the Department should pay for the entire cost of maintaining facilities it will own, control, and operate in conjunction with numerous other hatcheries throughout the State.

ADDITIONAL FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, including the pleadings, the evidence adduced, and the briefs filed, it is found and concluded in addition to the findings and conclusions heretofore stated that:

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[9]The Licensee points out (Reply br. p. 3) that sharing costs will create serious allocation problems with respect to administrative overhead and other costs associated with running the Department and its facilities throughout the State of California.

(1) The erection of the Iron Gate development eliminated approximately 16 miles of natural spawning grounds previously used by king salmon, silver salmon, and steelhead trout.

(2) A fish hatchery, the details of which are described in a stipulation filed with the Commission on August 17, 1962, (Appendix A), is required to sustain the anadromous fishery resources of the upper Klamath River at a level approximately equal to that which existed before the construction of the Iron Gate Development.

(3) The public interest in the conservation and the development of the fishery resources affected by the Iron Gate Development requires the construction of the fish hatchery by the Licensee, and its ownership, operation, and maintenance by the Department as hereinafter provided

ORDER

WHEREFORE, IT IS ORDERED, pursuant to Articles 49 and 50, Project No. 2082, as amended, subject to review by the Commission that:

(A) The Licensee shall provide for a site and arrange for, and pay for, the construction of a fish hatchery as described in the stipulation filed herein on August 17, 1962, (Appendix A).

(B) Plans for the aforesaid facilities shall be prepared by the Licensee, in cooperation with the State of California Department of Fish and Game, shall be submitted to the Commission for approval within 60 days of the issuance of this Order, and shall be constructed within one year from the date of approval by the Commission. Upon completion of the aforesaid

facilities, all the fish facilities shall be conveyed by Licensee to the State; provided that the Licensee shall not be required to reimburse the State of California for the cost of operation and maintenance.

William C. Levy,
Presiding Examiner.

[Appendix "A" to the Presiding Examiner's decision (Stipulation *re* size of hatchery) omitted.]

APPENDIX B.

[30 F.P.C. 499.]

OPINION NO. 381-A

PACIFIC POWER & LIGHT COMPANY,
PROJECT NO. 2082

Opinion and Order on Rehearing and Denial of Motion for Stay

(Issued August 19, 1963)

* * * * *

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

On April 10, 1963, Pacific Power & Light Company, licensee for Project No. 2082, applied for rehearing of the Commission's Opinion No. 381 and Order issued on March 14, 1963, 29 FPC 478, in the above-entitled proceeding. A second application for rehearing was filed April 12, 1963, by the Department of Fish and Game of the State of California. By order issued May 3, 1963, rehearing was granted for the limited purpose of affording opportunity for additional consideration. On examination of the rehearing applications we find that while the majority of points raised by Licensee and the Department are merely restatements of arguments raised in their exceptions which have been covered in our Opinion and Order and do not warrant further discussion here, certain aspects of our opinion require clarification.

Licensee urges that amended Article 49 of the license for Project No. 2082, as provided in ordering paragraph (A) of the order accompanying Opinion No. 381, is not in complete conformity with the July 20, 1962 stipula-

tion and distorts the agreed upon provision limiting the number of king salmon eggs required to be accommodated at the Iron Gate hatchery in any one year. Item No. 1 of the stipulation provides in pertinent part:

> 1. If the Commission determines that fish hatchery facilities are required at Iron Gate, said facilities shall be sufficient to accommodate the incubation, hatching, and rearing of the following kinds and numbers of fish each year:
>
> (a) * * * *
>
> (b) * * * * .
>
> (c) King salmon (*Oncorhynchus tshawytscha*) Rear up to 6,000,000 fingerlings to a total weight not to exceed 20,000 lbs., and release an additional 5,500,000 swim-up fry. Not more than 12,800,000 king salmon eggs are required to be accommodated in any one year by the Iron Gate hatchery facility; provided, however, if the total number of king salmon eggs taken at the Iron Gate egg collection facility in any one year is equal to or less than 15,800,000, the fish hatchery facilities described herein shall not be required to accommodate more than 81% of the total king salmon eggs taken during the year.

The clause omitted from Article 49 is the portion of Item No. 1 (c) which provides that "if the total number of king salmon eggs taken at the Iron Gate egg collection facility in any one year is equal to or less than 15,800,000 the fish hatchery facilities described herein shall not be required to accommodate more than 81% of the total king salmon eggs taken during the year." The Department, in its application for rehearing, specifically acknowledged its responsibility for the hatching

and rearing of 19 percent of the king salmon eggs taken at the egg collection station up to 15,800,000 per year[1] as representing the number of eggs formerly reared by the Department in connection with the abandoned Fall Creek hatchery. It was not our intention, in determining the capacity of the hatchery to be constructed at Iron Gate and the number of king salmon eggs to be accommodated therein, to change or modify any of the provisions of the stipulation or to release the Department from a recognized responsibility. No finding was made that deletion of the proviso is required to effectuate the purposes of the Federal Power Act and no such finding could have been made on the record presented in this case. Accordingly, we shall amend our findings and Article 49 of the license to include all provisions contained in Item No. 1(c) of the stipulation.

The Department's exceptions raise objections to certain language in the Commission's opinion which we take this occasion to clarify. In our discussion of the reasons for assigning 20 percent of the operating and maintenance costs of the hatchery to the State, we commented as follows as to the impact of the construction of the Iron Gate Dam:

> * * * To this extent, the river and the enjoyment thereof by the people of the State of California will be enhanced over its original condition. Availability of the Iron Gate Reservoir to the public for lake fishing, boating, swimming, and other recreational activities likewise indicates that the advan-

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[1]The Department states that it will defray 100 percent of the cost of rearing any king salmon eggs in excess of 15,000,000 taken in any year.

> tages to be derived from Licensee's election to construct the Iron Gate Development are not all one-sided. [P. 485.]

The Department's exceptions suggest that the language carries implications which are far reaching and which go beyond our intentions. We therefore wish to restate the Commission's position on the questions raised in the above-quoted sentences to avoid any such misinterpretation.

We do not believe that recreational advantages such as lake fishing, boating and swimming, which are by-products of Licensee's hydroelectric project of general public benefit, should constitute an off-set to the Licensee's responsibility to provide reasonable facilities to maintain the fishery resource of the river, in the absence of prior agreement to that effect by all interested parties or special circumstances not present here. There is much to be said for cooperation by local, state and Federal agencies to provide non-power benefits from multi-purpose projects beyond those which could feasibly be imposed upon an applicant for a license, but this does not apply to the provision of facilities intended to correct for damage to existing resources created by the construction of a project.

As a general rule, a licensee is required to make full recompense for the diminution of a natural resource resulting from a power development on a navigable stream. The evidence presented by the parties established that the construction of Iron Gate Dam will result in a lessening of the anadromous fish resource in the upper Klamath River and that a hatchery is necessary to counter this effect. A licensee in such circumstances would normally be required to pay all costs involved in

restoration of the fish resource, both as incurred in construction of the hatchery and in the yearly costs of operation and maintenance. In this case we shall require the licensee to construct the hatchery entirely at its cost, but there are special circumstances which persuade us that the State should assume 20 percent of the yearly cost of operation and maintenance of all fishery facilities at the development:

(1) The history of this controversy cannot be ignored. The proper apportionment of the cost of operating and maintaining the hatchery should be considered in light of the prior relationship between the State and the licensee with respect to the operation of the Fall Creek Hatchery, in which the State assumed all the expenses of operation. In 1919 after construction was begun on COPCO 1 and COPCO 2, the Fall Creek Hatchery was conveyed to the State, and in 1925 the licensee added fish trapping and egg collecting facilities to the Fall Creek Station. The State operated the Hatchery at State expense until 1948 and the egg collection facility until 1961. Thus, to eliminate any State participation in the operating cost of the Iron Gate Hatchery would be inconsistent with this pre-existing pattern.

(2) To impose the full cost of building and operating the hatchery on the Licensee would be to assess costs that would overcompensate for the damage by Licensee's project to the fish population. The evidence in the record suggests that the reregulation of the flow of Klamath River by the Iron Gate Dam combined with the construction and operation of the hatchery will result in a greater fish population than if Iron Gate had not been built. This would stem from the reduction or elimination of destruction of natural fluctuations and river

levels which will follow from the construction of Iron Gate Dam and its operation in accordance with the year-round minimum releases required by Article 52 of the license. To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the status quo but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions. Apportioning 20 percent of the operating costs to the State will more nearly result in restoring the status quo.

(3) Apportioning this small share of operating costs to the State will provide it with a financial incentive to insure economy of operation of the fish facilities.

The remaining assignments of error contained in the applications now before us do not convince us that we are incorrect in our determinations or, except for amending finding No. 4 and Article 49 to conform to the stipulation, that any further action is necessary on the rehearing other than to affirm our original decision and order.

Licensee had requested separately that it not be required to comply with the provision in the second sentence of Article 49 of the license for Project No. 2082 pending possible judicial review of the Commission's opinion and order. The sentence now provides: "Plans for the aforesaid facility shall be prepared by Licensee, in cooperation with the State of California Department of Fish and Game and the U.S. Fish and Wildlife Service, Department of the Interior, and shall be submitted to the Commission for approval within 60 days of the issuance of this order." In the alternative, Licensee requested that the time be extended for a short period, designating June 30, 1963. The 60-day period would

have expired May 13, 1963, had the running thereof not been tolled by our decision to grant rehearing solely in order to afford additional time to consider the matters set forth in the applications. It does not appear that a brief stay will materially affect the time required for construction of the hatchery. Accordingly, we shall extend the time for Licensee's compliance with the requirements of the quoted provision to October 15, 1963, in line with the request made in the second part of the motion filed April 10, 1963. In all other respects, the motion will be denied.

The Commission further finds:

(1) The assignments of error set forth in the applications for rehearing present no new facts or principles of law which were not fully considered by the Commission when it issued its Opinion No. 381 and Order, or which having now been considered, warrant any change in, modification, or rehearing of such Opinion and Order, except as stated above and specified below.

(2) There is no justification for, and the public interest would not be served by, granting a stay of the order accompanying Opinion No. 381, as herein amended, pending judicial review.

(3) Good cause exists for extending the time for compliance with the second sentence of Article 49, as amended, of the license for Project No. 2082 to October 15, 1963.

The Commission orders:

(A) The assignments of error set forth in the applications for rehearing in the above-entitled proceeding are hereby denied, except to the extent specified below.

(B) Finding No. 4 of Opinion No. 381 is amended to provide as follows:

(4) To compensate for the loss of the spawning areas described in Finding (3) hereof, a fish hatchery should be constructed, operated, and maintained at Iron Gate Development of a size and capacity to annually hatch and rear 200,000 yearling steelhead trout to a total weight not to exceed 20,000 pounds, 75,000 yearling silver salmon to a total weight not to exceed 5,000 pounds, 6,000,000 fingerling king salmon to a total weight not to exceed 20,000 pounds, and 5,500,000 king salmon swim-up fry; provided, not more than 12,800,000 king salmon eggs should be required to be accommodated in any one year at the Iron Gate hatchery facility; and provided further that if the total number of king salmon eggs taken at the Iron Gate egg collection facility in any one year is equal to or less than 15,800,000, the fish hatchery facilities described herein shall not be required to accommodate more than 81 percent of the total king salmon eggs taken during the year.

(C) Article 49 of the license for Project No. 2082, as amended by our opinion and order issued March 14, 1963, is further amended to provide as follows:

Article 49. The Licensee shall construct or arrange for the construction, at its expense, of a fish hatchery at Iron Gate Development, together with supplemental structures and ancillary equipment as detailed in the agreement filed with the Commission on August 17, 1962, by the State of California Department of Fish and Game and the Licensee, of a size and capacity to annually hatch and rear 200,000 yearling steelhead trout to a total weight not to exceed 20,000 pounds, 75,000 yearling silver salmon to a total weight not to

exceed 5,000 pounds, 6,000,000 fingerling king salmon to a total weight not to exceed 20,000 pounds, and 5,500,000 king salmon swim-up fry; provided not more than 12,800,000 king salmon eggs shall be required to be accommodated in any one year at the Iron Gate hatchery facility; and provided further that if the total number of king salmon eggs taken at the Iron Gate egg collection facility in any one year is equal to or less than 15,800,000, the fish hatchery facilities described herein shall not be required to accommodate more than 81 percent of the total king salmon eggs taken during the year. Plans for the aforesaid facility shall be prepared by Licensee, in cooperation with the State of California Department of Fish and Game and the U.S. Fish and Wildlife Service, Department of the Interior, and shall be submitted to the Commission for approval no later than October 15, 1963. The facility shall be constructed within one year from the date of approval of the plans by the Commission.

(D) The motion filed by Pacific Power & Light Company on April 10, 1963, is denied to the extent that stay is requested pending judicial review.

(E) In all other respects, the original opinion and order issued in these proceedings is affirmed.

[Commissioner O'Connor *concurring* in result. Commissioner Ross *concurring and dissenting in part,* and Commissioner Morgan *dissenting in part,* filed separate statements.]

Ross, *Commissioner, concurring in part and dissenting in part:*

I concur generally with the statement of Commissioner Morgan, and contend that California should

defray only those costs to which it has agreed in the stipulation in this case. In view of the fundamental shift in the majority's approach to a licensee's obligation regarding comprehensive development, a few additional comments are required.

The majority is holding that construction and operation of the fish hatchery, which it alleges overcompensates for the damage inflicted by Licensee's project to the fish population, constitutes a basis for this Commission's imposition of user charges. This holding assumes that the Commission has the authority to allocate, and should allocate, a portion of the costs of these supposed benefits to the people of the State of California.

Such a position opens a Pandora's Box. It means that licensees hereafter have a legal basis for contending that the citizens of any state wherein a hydroelectric power project is constructed which produces nonpower benefits (e.g., flood control, recreation, irrigation, fish and wildlife) should bear some part of the costs of the project which are attributable to the associated nonpower benefits regardless of whether the citizens of a state desire or request such benefits. With the instant opinion as precedent, it is difficult to see how this contention could be rejected.

Adoption of this concept might well be required in the years ahead when relatively less economical hydro sites, from a power aspect, may be developed. However, in my opinion, this is an extremely important step and Congress must first act and provide a legislative basis for our imposing of part of the costs of such development upon anyone other than the licensee. Once Congress determines that comprehensive development of

our water resources requires contributions from the users of nonpower benefits, then the Commission should make the required allocation.[1]

But in the absence of such legislation, we should continue to implement the policy, established by Congress, of requiring licensees to bear all the costs associated with the development of a navigable waterway. The Federal Power Act reflects the philosophy that any development must be consistent with a comprehensive plan of development, i.e., that which provides the greatest benefits—power and nonpower alike. The framers of the Act wisely insisted on comprehensive development as the *quid pro quo* of granting the right to private parties to use our nation's water resources for commercial purposes. This Commission should not waive this hard fought concession to the public interest.

For these additional reasons, I respectfully dissent to the majority's decision to the extent that it allocates 20 percent of the operating costs of the Iron Gate fish facilities to the State of California.

Morgan, *Commissioner, dissenting in part:*

I dissent from my colleagues' denial of the remedial relief requested by the petition of the Department of Fish and Game of the State of California for rehearing and, upon reconsideration, I must dissent from that portion of Opinion No. 381 which requires the Department to pay 20% of the total cost of operating and maintaining the Iron Gate fish facilities.

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[1]In this connection, I believe that any user charges should be imposed upon a statewide or national basis, depending upon whether the benefits are limited to the residents of a particular state or are available to all citizens.

By its petition for rehearing the Department has made it clear that it only offered, in its stipulation with the Licensee, to bear the cost of rearing 19% of the king salmon eggs taken at the Iron Gate fish facilities; and not *an additional* 19% or 20% of the entire cost of operating and maintaining hatchery facilities for the rearing of the remaining 81% of the king salmon eggs plus the eggs of additional species. Yet this is what the majority has attempted to force the State of California to do.

I cannot say whether my colleagues' decision to order the Department to assume 19% (in round numbers, 20%) of the *full* cost of operating those facilities was based on the mistaken belief that the Department had volunteered to do so. But I must say that mine was. Nor can I say whether my failure to recognize the Department's specific limitation on that 19% was due to the truncated record in this case, or to failure by the Department to make its limitation clear, or to inadequate analysis of the Department's proposal and the record herein.[1]

I have never knowingly departed, as some of my colleagues here depart, from that principle of resource development (explicitly set forth as Section 18 of the Federal Power Act) which requires licensees to conserve

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[1]However self-evident the facts and the law on this point may have been to the Department, it is now clear that to obviate confusion in minds more hurried and less familiar with the background facts than their own, the Department should have continued the method of making the governing distinction that it used in its Reply Brief before the examiner. It there treated the matter as follows (at p. 23):

> Whenever maintenance and operation costs and hatchery costs have been mentioned in this brief, such expense excludes 19% of the king salmon eggs taken at Iron Gate.

or to compensate for all resource values impaired, damaged or diminished by their use of the Nation's streams for generating electric power. My apparent willingness to do so in Opinion No. 381 was based solely upon the belief that the State of California—by way of settlement and for reasons best known to itself and not shown upon the record—had agreed to pay 19% of the cost of offsetting the damage that Licensee's Iron Gate Dam caused to the fish resources of the Klamath River.

I considered and believed that the 20% figure selected by my colleagues and here reiterated by the majority was a departure of only a single percentile from an agreement entered into by the State of California with the Licensee and that the difference, while supported by no rational explanation whatsoever, was *de minimis*. Accordingly, and solely in order to reach a decision I believed to represent no significant departure from principle, I concurred in their arbitrary selection of that figure.

But, as the supplementary pleading filed by California now makes abundantly clear, my belief was mistaken. That pleading now leaves us with no alternative but to remedy our error by requiring the Licensee

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This was done for the sake of brevity, so that continual reference would not have to be made throughout this brief to the exception of 19%.

During its oral presentation before the full Commission, the Department did not similarly limit or qualify its response when asked if it maintained that Licensee should be required ". . . to pay the whole cost of this hatchery?" Although the limitation or qualification is implicit in the remainder of the Department's response, its reply nevertheless was specific: "We are only asking them to pay for 81 percent of it." (Tr., page 339.) It is now clear that this was mere ellipsis.

to compensate the public in full for the damage inflicted; and the majority's obdurate refusal to do so here requires my most respectful but total dissent. Although the amount of money involved is negligible, the majority's refusal to vindicate the principle involved is a policy aberration of alarming precedential significance.

By themselves, the incidental flood control and recreation "benefits" that allegedly result from the existence of the Iron Gate Dam, although sharply disputed by the Department, essentially are nothing more than the inevitable results of the performance of licensee's duty to re-regulate stream flow fluctuations caused by its COPCO plant. As long as it was mistakenly assumed that the State had undertaken to defray a portion of the particular costs in question, the recital of those "benefits" in Opinion No. 381 (although objectionable to me) was in the nature of dicta and did not call for my dissent. However, those alleged, unsolicited "benefits"—"benefits" unwanted and unneeded prior to the building of Licensee's projects—are plainly no substitute for Licensee's duty to compensate for its impairment of Klamath *fish* resources; and I here dissent from any attempt to make them serve as such in law.[2]

The operative facts of this specific matter, the emergent issue, and the applicable law now are unmistak-

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[2]In Opinion No. 381 (at page 485) language appears which clearly shows that the Commission in that Opinion was balancing off alleged recreational "benefits" of Iron Gate to the State against the cost of remedial measures for the protection of fish resources to which the Licensee was obligated. In this present order the majority (at page 501) labors to assure us that it considers such a balancing to be improper and not to be contemplated under the Act. Yet here the majority reaches the same conclusion and the same division of costs between the par-

ably clear. Since 1919 the existence of the barriers caused by Licensee's COPCO projects, together with Licensee's failure to shoulder its proper responsibility under Federal law, required the Department to maintain and pay the operating costs of an artificial hatchery facility to accommodate some 3 million king salmon eggs produced by Klamath River fish whose upstream passage had been blocked by those dams for more than 40 years. From 1919 until it was abandoned as uneconomical in 1948, the Department conducted this service at the Fall Creek hatchery. Since then, and by employing tank truck transport, the Department has utilized its hatchery at Mount Shasta to accommodate the eggs formerly propagated at Fall Creek, and it has voluntarily agreed to go on doing so. These eggs comprise an annual average of 19% of the king salmon eggs which will be taken below Iron Gate. However, the existence of the Iron Gate Dam (completed in 1962) now constitutes a barrier to the migration not only of the 3,000 king salmon which produce those eggs *but, in addition, some 12,800 additional king salmon as well as several other species!*

A new hatchery is needed to accommodate the eggs produced by these additional fish if the annual runs are to be preserved, and the State of California has no obligation whatever to pay any of the costs thereof.

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ties as in Opinion No. 381! Can anyone explain these results? I think they can be explained, but it would be difficult to do so in a manner which lends stature to the majority's candor or objectivity.

The majority feels entirely free to abandon its original arguments. It does not feel at all free to abandon its original conclusion, even in the face of obvious difficulty in making that old conclusion square with the new or remaining arguments. We may be pardoned, I think, for asking what is going on here.

The obligation to defray *these* costs rests exclusively on the Licensee.

The record shows all this clearly, and because it does, we found and ordered that the Licensee must construct a hatchery to accommodate all fish runs impaired or blocked by Iron Gate, except those 3 million Fall Creek king salmon eggs that the Department historically has provided for and has voluntarily agreed to continue providing for. Responsibility for *operation* of this new Iron Gate fish hatchery follows *a fortiori* from the same reason and rule that compels us to require Licensee to *construct* that hatchery.

However, and intentionally or unintentionally, by distorting the Department's willingness to continue to provide for the 3 million Fall Creek king Salmon eggs it has provided for historically—which comprise 19% of the total king salmon run impaired by Iron Gate—the majority rules that the State of California must pay 20% of the *entire cost* of operating the hatchery we have decided Licensee must build to accommodate the fish runs blocked by erection of Iron Gate. This, it is now clear, is *over and above* the outlay the State has voluntarily agreed to continue making in order to provide for the 3 million king salmon eggs discussed above.

No valid reason is given for this decision. The record before us cannot provide a reason for this decision—with the exception of the reason clearly illuminated by the briefs, arguments and petition of the State of California: that the terms, effect and purpose of the agreement entered into by the State of California and the Licensee were misunderstood.

To misunderstand may be embarrassing, though it need not be so in this case: counsel for the State of

California must bear some responsiblity for the misunderstanding here. But to attempt to rationalize, defend and perpetuate a misunderstanding is inexcusable. And to do so in circumstances which produce a dangerous precedent adverse to a valuable principle is outrageous.

The majority now rests the conclusions it previously set forth in Opinion No. 381 on the following bases:

> 1. The history of this controversy cannot be ignored. The proper apportionment of the cost of operating and maintaining the hatchery should be considered in light of the prior relationship between the State and the licensee with respect to the operation of the Fall Creek Hatchery, in which the State assumed all the expenses of operation. In 1919 after construction was begun on COPCO 1 and COPCO 2, the Fall Creek Hatchery was conveyed to the State, and in 1925 the licensee added fish trapping and egg collecting facilities to the Fall Creek Station. The State operated the Hatchery at State expense until 1948 and the egg collection facility until 1961. Thus, to eliminate any State participation in the operating cost of the Iron Gate Hatchery would be inconsistent with this pre-existing pattern. [P. 502.]

Indeed we should not lose sight of the history of this controversy! But the use the majority opinion makes of that history in an attempt to justify its mistaken conclusions is little short of incredible.

"This controversy," Opinion No. 381 explains at page 479, involves the question of whether Licensee should be required "to erect and maintain a fish hatchery . . . to

continue the runs of salmon and steelhead trout *which have been displaced by Licensee's construction of its Iron Gate Development on the Klamath River*" seven miles below COPCO No. 2 [emphasis added].

Iron Gate was licensed in 1957; its construction was completed in January 1962; and in Opinion No. 381 we found that it constitutes an impassable barrier to all fish that formerly spawned in the eight miles between Iron Gate and COPCO No. 2. There is no controversy here. Opinion No. 381 settled the matter.

Nor is there any controversy here over who will pay to hatch the eggs of the fish whose upstream passage was blocked by COPCO No. 2 in the past and which is now blocked eight miles downstream (along with the upstream passage of many other fish) by the new Iron Gate barrier. The State always paid to hatch the eggs of the fish formerly blocked by COPCO No. 2 and the State proposes to continue to do so. The eggs of the fish formerly blocked by COPCO No. 2 and now blocked by Iron Gate comprise 19% of the 15.8 million eggs of king salmon blocked by Iron Gate; so the State has volunteered to bear the expense of hatching 19% (or 3 million) of the 15.8 million eggs of king salmon blocked by Iron Gate. Plainly the Federal Power Act never requested the State to defray the cost of hatching those 3 million eggs in the past; and plainly that Act does not require the State to do so now that the COPCO plants have been put under license and made subject to the Comprehensive development requirements of Section 10(a) and Section 18 of the Act. Nevertheless, the State has volunteered to pay the cost of hatching those 3 million eggs, and there is no question or controversy over that matter here.

This controversy only relates to who should bear the cost of operating and maintaining a hatchery big enough to hatch the eggs of only those fish that formerly spawned in the eight-mile stretch between Iron Gate and COPCO No. 2. There is not even any dispute as to the number and weight of fish that the hatchery must hatch: the parties have stipulated the size of a hatchery sufficient to hold the eggs of only those fish that previously spawned in "the lost spawning areas above Iron Gate" and below the COPCO No. 2 facilities (Examiner at pp. 490-491, Opinion No. 381 at pp. 482-483). We found that "since Licensee has created the situation which necessitates [a] fish hatchery" adequate to hold the eggs of (only) the stipulated number of fish that previously spawned in the gravels above Iron Gate, "it is no more than reasonable to require it to pay the cost of construction thereof." Thus there is no controversy with respect to construction of the hatchery.

Licensee argued that we should not require it to pay the cost of operating and maintaining the (stipulated) hatchery, because state law says the state will do so and because the state paid the cost of operating the old (3 million egg) COPCO hatchery at another reach of the River. In Opinion No. 381 we said those historic matters are "wholly immaterial," because (a) "the Federal government, in its enactment of the Federal Power Act has occupied the entire field"; and (b) because "the Fish and Wildlife Coordination Act . . . contemplates that power companies operating under a federal license would be required to make adequate provision for fish conservation as a condition of the license." We did not feel it was necessary to explain that the comprehensive development standard of Section 10(a) of the Act

means that if *Licensee's use* of the waters to develop electricity results in damage to fish or other resources, *Licensee* must pay for facilities to preserve them; and we did not feel it was necessary to point out that Section 18 of the Act says that "the Commission shall require the construction, maintenance and operation by a licensee at its own expense of . . . such fishways as may be prescribed . . ."

Now the majority contradicts itself. Contrary to its own exposition of the requirements of the Act, the majority now says that the State must help pay to preserve a resource damaged by a re-regulating hydroelectric plant licensed by us in 1957, because in the past and under a discredited, inapplicable state law, the State had to pay to preserve a different and separate fish resource impaired by an unlicensed plant, built before enactment of the Federal Power Act, in a different reach of the River.

I heartily dissent from this contradiction; and totally disassociate myself from the majority's attempt to obfuscate and conceal the operative facts of this controversy. The majority need not stoop to conquer.

The majority then proceeds to its next major point:

> 2. To impose the full cost of building and operating the hatchery on the Licensee would be to assess costs that would overcompensate for the damage of Licensee's project to the fish population. The evidence in the record suggests that the reregulation of the flow of Klamath River by the Iron Gate Dam combined with the construction and operation of the hatchery will result in a greater fish population than if Iron Gate had not been built. This would stem from the reduction or elimination of

> destruction of natural fluctuations and river levels which will follow from the construction of Iron Gate Dam and its operation in accordance with the year-round minimum releases required by Article 52 of the license. To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the *status quo* but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions. Apportioning 20 percent of the operating costs to the State will more nearly result in restoring the *status quo.* [P. 502.]

The stipulation entered into by the parties to this proceeding provides that: "(1) if the Commission determines that fish hatchery facilities are required at Iron Gate, said facilities shall be sufficient to accommodate . . ." the stated number of fish whose spawning grounds were blocked by Iron Gate.

The Commission, in Opinion No. 381, found that a fish hatchery was required at Iron Gate; and that a Hatchery of the stipulated size will "preserve and maintain [the fish resources] *at a level approximately equal to that which existed prior to the construction of the Iron Gate Development*" [emphasis added].

The Commission failed to find that re-regulation of the River will improve the fish resource over its condition prior to Iron Gate, because the record contained no evidence whatsoever to support such a finding. It does not contain any now. Further, contrary to the majority's empty assertion here, the record does not even "suggest" that re-regulation and the hatchery combined "will result in a greater fish population than if Iron Gate had not been built."

Obviously, if the majority's present "reasoning" is to hold water, it must rest on findings of fact, and those findings in turn must be based on a preponderance of solid evidence in the record before us. Neither the findings nor the evidence upon which to base them can be pointed out.

Here again, therefore, the majority fails in its attempt to manufacture now a reason why—contrary to the record evidence, its own findings, and the requirements of the Federal Power Act—it ordered California to pay 20% of the cost of operating and maintaining the project facilities that the comprehensive development standards of the Federal Power Act require Licensee to maintain.

Finally the majority rests its order on the following:

> 3. Apportioning this small share of operating costs to the State will provide it with a financial incentive to insure economy of operation of the fish facilities. [P. 502.]

Here the majority discloses what it now insists was a central purpose underlying its imposition of 19% (rounded to 20%) of the O & M costs of the fish hatchery on the State of California. That purpose was to protect the Licensee from assumed extravagance on the part of the State. The question of the ethics of the State of California was not made an issue in the proceeding but apart from this the requirement that the State must pay 20% would *very likely* achieve the desired result. We may likewise assume that if the Commission were to require the State to pay 100% of the O & M costs it would *almost certainly* achieve the desired result. Better still, if the Commission were to require the State to pay

the Licensee 200% of the O & M costs it would *certainly* achieve the desired result.

But this exhilarating vista of expanding Commission jurisdiction over the sovereign states (in order to protect Licensees from conjectural expense) evaporates when a simple question is asked: What is the statutory authority for the Commission to impose such a charge on the State? The answer is: No such authority exists in law.

I agree that the Licensee is entitled to protection against State extravagance, whether real or fancied. Such protection is afforded by the arrangement, which has been operating successfully for years, between the Department of the Interior and California as well as a number of other States. Under this arrangement the Department builds hatcheries to correct damage to State fishery resources caused by its dams, turns those hatcheries over to the State and reimburses the State for operation and maintenance. Prior to the beginning of each fiscal year a budget conference between the State and the Department is held for the purpose of reaching agreement on operation of each hatchery during the coming year, and the hatchery is operated in accordance with that annual budgetary agreement.

Such an arrangement could properly be required as a license condition here, and the Commission could reserve the right to settle any dispute which prevents agreement in the unlikely event such a dispute were to occur. This is the pattern suggested by California during oral argument. It is the pattern we should have adopted here. It is equitable; it provides all the protection needed by the Licensee; and it does *not* require the Commission to exceed its statutory powers.

* * * * *

In sum, the majority defends its ruling that California should bear 19% (rounded to 20%) of the hatchery O & M costs by citing: (1) a history of the controversy which the majority clearly misunderstood and misapplied, (2) an hallucinatory claim that such costs would exactly balance an unproved "over-compensation" of the State by the Licensee, and (3) a claim that imposition of such costs is necessary to preserve California's virtue.

Let us examine item (2) at greater length, though the temptation is great to discourse further on all three.

If my reading of the majority's reason No. 2 is correct, it is as follows: The parties in this controversy have agreed upon the size of the hatchery to be built, but their agreement was in error. Further, the majority knows the nature and direction of the error: the hatchery agreed upon is not too small; it is too large. It is too large because that hatchery, in combination with future improved conditions in the spawning beds below Iron Gate will, in the course of time, result in the propagation of more fish in the future than before Iron Gate was built. Further, the majority knows exactly how many more fish will be propagated in the future than before Iron Gate was built, as well as the *value* of those additional fish. Therefore the majority feels able to correct, with precision, the error made by the parties to the agreement. It finds, on the basis of no evidence beyond the foregoing assertions, that experience *in future years* will demonstrate that Iron Gate re-regulation, plus a too-large fish hatchery, will overcompensate California by exactly the amount equal to 19% (rounded to 20%) of the cost of operating and maintaining the stipulated fish hatchery!

I freely confess that I lack both the evidence and the expertise necessary to make such daring yet meticulous calculations involving the life and behavior of generations of fish yet unborn, and the operation of facilities yet unbuilt. If I possessed such expertise and evidence I might have been tempted to correct the (assumed) error of the parties by the simpler method of adjusting the size of the hatchery those parties had already agreed to.

If the majority really possessed this dazzlingly intuitive expertise I am confident they too would have made such a correction. But they did not. It matters little whether we conclude they failed to do so because they had neither the expertise nor the evidence on which to act, or because they are here merely attempting to rationalize a misunderstanding.

What is important is that they lacked the authority to do what they decided to do.

* * * * *

A clear understanding of and correct ruling on this matter can be achieved by the reading of a simple and undisputed statement of fact, plus the answers to two simple questions. The simple statement of fact is as follows: The fishery facility we have prescribed and have ordered Licensee to build is required in order to correct and repair damage inflicted on the fishery resource of the Klamath River in California by the Iron Gate Dam constructed by Licensee.

Question number one: How much of this damage resulted from activities of the people of the State of California? Answer: None.

Question number two: What proportion of the cost of repairing this damage should be borne by the people of the State of California? Answer: None.

The majority, by an indirect, oblique approach, attempts to lend the authority of this Commission to a new and alarming theory—that a Licensee, without the agreement or consent of a sovereign State, may impose charges on the State for asserted but disputed and unwanted "benefits" arising indirectly from Licensee's use of the Nation's rivers for the generation of electric power; and that this Commission, under the Federal Power Act, has the authority to force the State to bear those charges against its will.

If the majority seriously believes it lawfully has this power—which I maintain it does not—it should (attempt to) assert that power openly, citing statutory authority, rather than attempt to establish such power obliquely, as it does here, by entangling its new theory with a legitimate dispute over the proper responsibility of a Licensee to repair and correct damages it has inflicted upon a natural resource of the State of California.

I believe the majority's attempt to establish such a theory will fail, regardless of whether it is made openly or as in this proceeding, and I concur in the dissenting remarks of Commissioner Ross on this subject.

The one question properly before us is the responsibility of Licensee to protect and conserve the fishery resource of the Klamath River in California.

This Commission has committed a serious error, and in doing so has set a precedent dangerous to the rights of the several States and their citizens, by attempting

to force the people of California to pay costs not rightly theirs, for damages not inflicted by them, upon a resource they have every right to enjoy unimpaired. There is an obligation to pay for correcting the damage inflicted on that resource by Licensee's project. But that obligation rests squarely on the Licensee. Not one iota of that responsibility rests upon the public.

If Licensee and the State of California *had* entered into an agreement to share the costs of meeting that responsibility in the manner mistakenly understood to be the case on first presentation of this matter before us, this Commission would have had adequate statutory authority to examine such an agreement and decide whether its impact *on Licensee's customers* did or did not serve the public interest. But, as is now clear, *there was no such agreement*, and we have not the slightest shred of statutory authority to concoct a substitute therefor and then proceed to force the State of California, against its determination of the public interest and against its will, *to accept it and require its taxpayers to pay for it.*

The majority's attempt to force the people of California to do more than they voluntarily agreed to do is wrong and cannot be supported by facts, by logic or by law. I am confident that on review their attempt will be struck down by the courts, as it should be.

APPENDIX C.

Decree.

United States Court of Appeals, for the Ninth Circuit.

Pacific Power & Light Company, Petitioner, vs. Federal Power Commission, Respondent. No. 18853.

Department of Fish & Game of the State of California, Petitioner, vs. Federal Power Commission, Respondent. No. 18954.

Before: Pope, Merrill & Duniway, Circuit Judges

These causes came to be heard upon petition of Pacific Power & Light Company filed August 22, 1963 and the petition of the Department of Fish & Game of the State of California, filed October 16, 1963 to review an order of the Federal Power Commission issued by it on March 14, 1963 and as amended by a further order issued on August 19, 1963. The Court heard argument of respective counsel on March 9, 1964 and has considered the briefs and joint appendix filed in this cause.

On consideration whereof, and pursuant to the opinion rendered and filed, on June 8, 1964, It Is Ordered, Adjudged and Decreed by this Court that said causes be and hereby are remanded to the Federal Power Commission for further proceedings, not inconsistent with the opinion of this Court, relating to the cost of operating and maintaining the fish trapping and egg taking facilities, and for such clarification of Article 50 as it may desire to make. In all other respects, the orders of the said Federal Power Commission be, and hereby are affirmed.

A True Copy
Attest: August 21, 1964
Frank H. Schmid, Clerk.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Pacific Power & Light Company, Department of Fish and Game of the State of California, Petitioners, vs. Federal Power Commission, Respondent. Nos. 18,853 and 18,954 [333 F. 2d 689].

[June 8, 1964]

On Petitions to Review an Order of the Federal Power Commission

Before: Pope, Merrill and Duniway, Circuit Judges

Duniway, Circuit Judge:

These are petitions, consolidated for hearing and determination, to review a decision of the Federal Power Commission. The order in question relates to the Iron Gate Dam on the Klamath River in Northern California, a facility constructed by petitioner, Pacific Power & Light Company (Pacific) under a Commission license. Pacific attacks the portion of the order that requires it to construct, at its expense, a fish hatchery, and to reimburse the Department of Fish and Game of the State of California (Department) for 80 percent of the cost of operating the hatchery and of operating fish egg taking facilities already constructed. The Department also attacks the order, urging that Pacific should be required to pay 100 percent of the cost of the operation of these facilities, with one exception.[1]

[1]The Department voluntarily consents to bear operation and maintenance costs of Iron Gate Fishery facilities that may be incurred for all king salmon egg taking at Iron Gate over 15,800,000 annually, and 19% of the quantity up to that figure.

(This footnote is continued on the next page)

The Klamath River, which rises in Southern Oregon and flows into and across California to the Pacific Ocean, has long been a famous fishing stream, supporting large numbers of anadromous fish: king salmon, silver salmon and steelhead trout. Pacific's predecessor, the California Oregon Power Company (Copco), constructed five hydroelectric plants on the river and its tributaries, between 1908 and 1925. None was licensed by the Commission; three were constructed before the enactment of the Federal Water Power Act on June 10, 1920.

Two of the plants, Copco No. 1, built in 1918, and Copco No. 2, built in 1925, are located close together on the river and about 100 miles from the sea. Their construction cut off access to spawning areas above them, and Copco and the State of California therefore agreed that Copco should build a fish hatchery at Fall Creek, just below Copco No. 2, and an egg taking station. The hatchery was conveyed to the state, which operated it at its own expense, until 1948, when it was abandoned. Thereafter, eggs taken at the station were transported by the state to its Mt. Shasta hatchery.

Copco No. 1 and No. 2 have been operated as peak load facilities. Water was released downstream only when it was desired, because of demands on the Copco system, to add their power output. This has resulted in sudden and extreme fluctuations in the flow of the

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It asserts that it has not agreed to bear any costs with respect to species other than king salmon, or 81% of the king salmon eggs up to 15,800,000 annually.

The Department takes this distinction based upon its historical assumption of operation and maintenance costs of the now abandoned Fall Creek facilities and facilities substituted since its abandonment. However, this distinction becomes irrelevant in view of the conclusions we reach, *infra*.

river, which, in turn, has been detrimental to the fishery and hazardous to human life. While Copco claimed that its operation in this manner had continued so long that it had a prescriptive right to continue it, the state took a contrary position, and sought to prevent the operation as a public nuisance. In 1950 it filed suit for that purpose. (See *California Oregon Power Co. v. Superior Court,* 1955, 45 Cal.2d 858, 291 P.2d 455).

In 1951, Copco applied to the Commission for a license to construct another facility, called Big Bend No. 2. The Commission then issued an order requiring it to show cause why all of the existing facilities should not be brought under license. (See *California Oregon Power Co.,* 10 F.P.C. 1561) In 1954, the Commission held that all of the facilities were within its jurisdiction. (13 F.P.C. 1; 15 F.P.C. 14; *California Oregon Power Co. v. F.P.C.,* D.C. Cir., 1956, 239 F.2d 426) The 1954 order left open the question whether a license should require the installation of re-regulating facilities at Iron Gate.

In 1957, Copco asked for a license, Project No. 2082, for the existing facilities, and also for an amendment of the license to authorize the Iron Gate development, for two stated purposes, production of power and regulation of the flow of the river. Thereafter, in 1959, Copco and the state entered into an agreement which refers to the state's pending lawsuit and Copco's pending application for a license for Iron Gate. It recites that Iron Gate will regulate the flow of the river in the manner desired by the state, and that the desire of the parties is to facilitate the issuance of the license. Copco agrees to proceed with the development as soon as licensed, and to release water from it in a manner

specified. The agreement, paragraph 3, also provides: "Copco shall construct permanent fish trapping and egg collecting facilities at or near and downstream from the Iron Gate development, . . . and title thereto, . . . shall, upon completion of the facilities, be conveyed by Copco to the State;".

Copco received from the state a dismissal, with prejudice, of its lawsuit, and a release. It agreed, pending construction of Iron Gate, to "manually operate" Copco No. 1 and No. 2 so as to limit downsteam fluctuations. The release is: ". . . from any and all claims, demands, actions and causes of action, for any and all legal and equitable relief arising at any time in the past, and for such reasonable future time as may be necessary for construction of the Iron Gate development referred to in said agreement by reason of alleged conduct of Copco of the kind described in the complaint in an action in the Superior Court of the State of California, in and for the County of Siskiyou, No. 13995." The agreement states, in reference to the release and dismissal: "The parties hereto understand and agree that the effect of said dismissal with prejudice and said release will be that no claim will ever be made against Copco in the future for damages or any other relief arising out of any act or omission of Copco, up to the date of this agreement so long hereafter as Copco shall perform its obligations under this agreement, of the kind embraced within the complaint in said state court suit; but that the prosecution of any action hereafter brought, claiming relief by reason of alleged wrongful conduct of Copco occurring after the date of this agreement, shall not be prejudiced thereby." It also provides: "The State, the Department and

the [California Fish and Game] Commission shall forthwith cause to be withdrawn and dismissed all protests and interventions with respect to the pending applications of Copco before the Federal Power Commission in Project No. 2082, and before the State Water Rights Board in Application No. 17,527; provided, that the right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping, and egg collecting facilities referred to in paragraph 3 thereof." It does not state at whose expense the fish trapping and egg collecting facilities are to be operated. Pacific asserts that conveyance of title to the state means that the state is to operate them at its own expense, particularly because the reservation of the rights to be heard in future proceedings in regard to fishery facilities expressly excepts the fish trapping and egg collecting facilities.

Pursuant to the agreement, the state, the Department and the California Fish and Game Commission withdrew their protests and interventions in the Commission's Project No. 2082, and the Commission issued its license for Iron Gate in January, 1960. (23 F.P.C. 59; 25 F.P.C. 579). The order amends the license for Project No. 2082 to include the existing facilities, and to authorize Iron Gate, all as part of a single project. Article 30 contains the following reservations: "The Commission reserves the right to determine at a later date after notice and opportunity for hearing, the following matters . . . (b) Whether the Licensee for Project No. 2082 shall construct, operate and maintain a fish hatchery and appurtenant facilities."

Article 42 requires construction of the agreed-upon fish trapping and egg collecting facilities. It is silent

on the subject of their operation. Article 43, on the other hand, requires Copco to construct, maintain and operate fish ladders, fish traps, or other fish handling facilities or fish protective devices.

An amendment of March 27, 1961 adds Articles 49 and 50:

> "Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.
>
> "Article 50. The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near and downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing."

Articles 42 and 43 were eliminated. The license, as so amended, was accepted by Copco.

In August, 1961, the Department petitioned, in Project No. 2082, pursuant to Article 49, for an order re-

quiring Pacific to construct, operate, and maintain a hatchery adjacent to the egg collecting station. The petition does not ask that Pacific be required to pay the cost of operating the egg collecting station. Pacific denied that a hatchery was necessary or appropriate, and the matter was heard on these pleadings. Pacific and the Department stipulated as to the size and type of hatchery that would be built, if the Commission should so order, but reserving Pacific's claims that a hatchery was not required and that, if required, Pacific should not pay for it or for its operation. The power of the Commission to require the construction and operation of fishery facilities, including a fish hatchery, rests on section 10(a) of the Federal Power Act, 16 U.S.C. §803(a), which provides that all licenses issued by the Commission shall contain conditions:

> "That *the project* * * * shall be such as in the judgment of the Commission will be best *adapted to a comprehensive plan for improving or developing a waterway or waterways* for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and *for other beneficial uses, including recreational purposes;* * * *" (Emphasis added)

The petitioners are agreed that the Commission is empowered by this subsection to require the construction and maintenance of a fish hatchery. The basic questions, then, are whether this is an appropriate case for the exercise of that power, and if so, whether the power has been properly exercised. Pacific also concedes that the question of whether a hatchery should be built was reserved, both in its agreement with the state and in the Commission's prior orders, and was properly

before the Commission upon the Department's August, 1961 petition. Its contention is that the evidence does not sustain the determination that a hatchery was needed. We do not agree.

The evidence shows that one of the reasons for constructing the Iron Gate Dam was to regulate the flow of the stream, so as to eliminate the extreme fluctuations caused by the method of operating Copco Nos. 1 and 2. It was Copco that chose to operate them that way. It could have abated the fluctuations by operating them in a different manner. It preferred the Iron Gate Dam because this would assure the continued operation of Copco Nos. 1 and 2 as peak load facilities, would create another source of powar at Iron Gate Dam itself, and would eliminate the fluctuations as the state was seeking to require, both in its lawsuit and before the Commission. The fact that the state, which had been seeking to abate what it claimed to be the nuisance created by Pacific's method of operating its two facilities, decided to accept this method of abatement, does not make the choice that of the state rather than that of Pacific. At most it makes it the choice of both. When parties settle a controversy, the settlement is ordinarily not forced by one upon the other—usually it is a result somewhere between the desires of either.

The way in which these objectives were accomplished was by the building of a dam at Iron Gate, some 8 miles below Copco No. 2. This created a reservoir area some 8 miles long, into which flows the irregular discharges from the two Copco facilities, and in which they are held The power plant and dam at Iron Gate are then so operated as to maintain a reasonably con-

tinuous discharge of water below Iron Gate. This does eliminate the fluctuations below Iron Gate, and does improve the fishery below Iron Gate.

There is, however, another result. The new reservoir, above Iron Gate, submerges some 16 miles (about 8 on the Klamath; about 8 on its tributaries) of the better fishing and spawning grounds on the river. It covers them with comparatively still water, and renders them unfit for spawning, and less desirable as habitat. The evidence supports, though it may not require, a finding that most fish headed upstream and reaching the barrier of Iron Gate Dam will not turn back downstream to spawn, and that a substantial percentage (perhaps over 50%) of the fish moving upstream will be so affected. The fish could not testify. The commission had to rely upon studies by, and the opinion testimony of, expert biologists. In the nature of things, precision in prediction was quite impossible. But as we read the record, we think that it fairly supports the Commission's conclusions that "without a hatchery there can be no assurance that the fishery resource will be preserved and maintained at a level approximately equal to that which existed prior to construction of the Iron Gate Development" and that "[s]ince Licensee has created the situation which necessitates the fish hatchery, it is no more than reasonable to require that it pay the cost of construction thereof."

We have no doubt that the Commission could require Pacific to construct the hatchery at its own expense. Pacific's operations, as a unit, substantially interfere with the natural ecology of the river and deleteriously affect one of its most valuable recreational features. It is quite proper that, as a condition to its

having the privilege of so doing, Pacific should be required to pay for facilities that will, at least in part, prevent the impairment of the principal recreational feature of the stream.

The Commission's orders do not directly require that the hatchery be conveyed to the state, as the contract between Pacific (Copco) and the state requires that the egg taking facilities be conveyed. But this result is certainly implicit in the order, else why the requirement that Pacific reimburse the Department for 80 percent of the cost of its operation and maintenance? At oral argument, counsel for Pacific stated that it would prefer to own and operate the hatchery itself. This, however, seems to be an afterthought. We cannot find in the record any indication that it seriously urged this contention before the Commission. There, its position has been (a) that no hatchery is needed, (b) that if one is needed, Pacific should not be required either to build it or pay for it, and (c) that in any event it should not be required to pay for maintenance and operation. It does not now urge that the state is not able or willing to operate the hatchery properly.

Assuming that the contention is available to Pacific, we cannot say that it is improper for the Commission to require conveyance of the hatchery to the state. The state and federal governments are not such separate entities, either legally or in fact, that one cannot call upon the other to help to achieve, in the public interest, a result that they both desire. The objective that the Commission seeks here is one that Congress has authorized it to seek. The choice of means, so long as they are reasonably adapted to achieve the authorized end, is not for Pacific, but for the Commission. There is

no doubt, upon this record, as to the competence of the state to operate the hatchery, or its willingness to do so. If there be evidence in the record that Pacific is equally able and willing, it has not been called to our attention.

There remain the questions of the expense of maintenance and operation (1) of the hatchery and (2) of the egg taking facilities. As to the hatchery, we think that what we have already said disposes of the question. If the Commission could have required Pacific to build and itself to maintain and operate, and if, as we have held, it could require conveyance of the hatchery to the state, it can also require that the state be reimbursed for the expense of maintenance and operation. Unless the hatchery is maintained and operated, its construction means nothing, and the desired end, preservation of the fishery, will not be achieved.

Pacific's reply is, first that the Commission is meddling in matters that are beyond the scope of the Federal Power Act, and is acting in contravention of state laws. It says that, if no funds were provided by it, the Department would still be required by state law to operate the hatchery at its expense, and that therefore the Commission's order improperly interferes with the fiscal affairs of the state, and unlawfully imposes upon Pacific a burden that, under state law, Pacific is entitled to have the state bear. It says, second, that its settlement agreement with the state gives it a contract right to have the state maintain and operate the hatchery.

In support of its first argument, Pacific cites Section 5938 of the California Fish and Game Code. That section provides:

> "Whenever in the opinion of the [California Fish and Game] commission it is impracticable, because of the height of any dam, or other conditions, to construct a fishway over or around the dam, *the* [*California Fish and Game*] *commission may,* in lieu of the fishway, *order the owner of the dam completely to equip,* within a specified time, on a site to be selected by the department, *a hatchery,* together with dwellings for help, traps for the taking of fish, and all other equipment necessary to operate a hatchery station, according to plans and specifications furnished by the department. *After such hatchery has been constructed,* the department shall operate *it* without further expense to the owner of the dam except as provided in sections 5940 and 5941." (Emphasis and bracketed words added.)

It was first enacted in 1917 (Cal. Stats. 1917, ch. 749, §1), before the Federal Water Power Act, and on its face deals only with hatcheries ordered constructed by the state. It does not purport to deal with federally licensed projects. Here, it is the Commission, not the state, that ordered the hatchery constructed. The Department's request that the Commission do so does not make the order the state's order. Indeed, we think it doubtful that the state could have ordered this federal licensee to construct a hatchery at this federally licensed facility. We think there is nothing in Pacific's first contention. Nor is there anything in Pacific's argument that the Department has no authority to receive or use the funds required to be paid to it. We doubt if Pacific has any standing to raise the question. Section 13,011 of the California Fish and Game Code does not support Pacific's arguments.

The short answer to Pacific's second contention is that there is nothing in the agreement with the Department, or the release, that requires that the Department, rather than Pacific, pay for the operation or maintenance of the hatchery. On the other hand, Article 49 of Pacific's license does require Pacific to "construct, maintain and operate, or . . . arrange for the construction, maintenance and operation of artificial propagation facilities . . . as may be prescribed hereafter by the Commission. . . ."

The egg taking facilities present a different question. They were provided for in Pacific's agreement with the Department, had been constructed and conveyed to the Department, and were being operated by the Department, when the order under review was made. We assume that Article 50 reserves the question as to who shall pay for operation and maintenance, as the Department claims.[2] But we are of the opinion that the contract, although it does not specifically refer to maintenance and operation, contemplates maintenance and operation by the Department, and that the reservation in the contract relating to fishery facilities, which specifically excepts these facilities from its terms, does not reserve to the Department the right to demand that maintenance and operation be paid for by Pacific. The Department made a post hoc attempt to

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[2]We are not, however, convinced that it does. Article 50 refers to facilities of this kind that "may be prescribed hereafter . . . after notice and hearing." Hereafter must mean after March 27, 1961, when Article 50 was added to the license. The Commission had previously, in Article 42, of January 13, 1960, ordered Pacific to construct the agreed facilities. They were completed and tendered to the state by February of 1962. How, then, can Article 50 refer to them? On its face, it appears to refer to possible different or additional facilities.

keep the question open by accepting the conveyance of the facilities, as agreed, but seeking to reserve the question unilaterally. This, however, cannot change the effect of the agreement, although the Commission seems to rely rather heavily upon it. We do not think that Article 50 is a valid contrary determination by the Commission. Nor does the original reservation in Article 30 of the license for Iron Gate reserve this question. The Department's petition did not ask for this relief specifically.

It may well be that none of these facts, as a matter of law, prevents the Commission from requiring Pacific to pay for the maintenance and operation of these facilities.[3] But the existence of power in the Commission does not dispose of the problem. The state arrived at a settlement with Pacific, under which these facilities were constructed and conveyed by Pacific to it. The Commission, to that extent, saw to it that the state got this benefit of its bargain. The state reserved no right to make further demands in this connection. We hold that it impliedly agreed to pay for maintenance and operation. This, together with the Commission's orders relating to the hatchery, appears to us, absent other facts, to assure the desired preservation of the fishery. The Commission gives us no reason in public policy why the Commission should now transfer the burden to Pacific and relieve the state from its bargain. We think that it would be justified in so doing only if it found upon sufficient evidence that

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[3]The Commission says that it is not bound by any agreement between Pacific and the Department, citing *F.P.C. v. Oregon*, 349 U.S. 435; *First Iowa Hydro-Electric Coop. v. F.P.C.*, 328 U.S. 152, and other cases. This, however, does not mean that the Commission can arbitrarily disregard the contract.

there are sound reasons to do so. It made no such finding or determination. So far as its findings and opinion reveal, it based its decision entirely upon what we hold to be its erroneous legal conclusions, either (a) that the state had not agreed to pay the cost of operation and maintenance, or (b) that the state could unilaterally relieve itself of its obligations, or (c) that Article 50 had the effect of relieving the state of its obligations.

The Commission now asserts in its brief that it is not bound by the contract, assuming that it means what Pacific says that it does and what we hold that it does. We quite agree that this is not a private lawsuit between Pacific and the Department. We also agree that the Commission is not "bound" by the contract. We do not, however, think that this alone is a reason for disregarding the contract.[4] As the Supreme Court has said in *Burlington Truck Lines, Inc. v. United States,* 1962, 371 U.S. 156, 167:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co. v. Federal Trade Comm'n,* 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements

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[4]The Federal Power Act, §313(b) (16 U.S.C. §251*l*(b)) declares that this court, on review of an order of the Commission, has jurisdiction "to affirm, modify or set aside such order [of the Commission] in whole or in part." The Administrative Procedure Act, §10(e) (5 U.S.C. §1009(e)) directs that this court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

> for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster, which rules with no practical limits on its discretion.' *New York v. United States,* 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n v. RCA Communications, Inc.,* 346 U.S. 86, 90."

The Commission does not act in a vacuum, and we think it just as much bound to take into account a contract of this kind, which, if carried out, would assist in accomplishing the result that the Commission desires, as it is to take into account the topography of the Klamath River Basin and the biological functioning of anadromous fish. Surely, it would be arbitrary if the Commission had concluded, in the face of the evidence, that the fish would spawn successfully in the reservoir formed by the Iron Gate Dam, when all of the evidence is that they would not. So here we think it arbitrary for the Commission to disregard the contract for no apparent reason. It has not found, and it makes no attempt to point to any evidence that would support a finding of reasons to disregard the contract and thus relieve the state of its bargain.

There remains the Department's contention that the Commission could not require that it pay 20 percent of the cost of maintenance and operation of the hatchery. The Commission did not so order. It merely ordered that Pacific pay 80 percent. The Department asserts that section 10(a) of the Act, quoted *supra,* requires that the Commission impose the entire cost upon Pacific. The section certainly does not do so ex-

pressly. It merely requires conditions in the license that, "in the judgment of the Commission," will be best adapted, *inter alia,* "for other beneficial uses, including recreational purposes." We think that this gives the Commission wide latitude, and that its judgment should not be disturbed unless exercised in an arbitrary manner.

Here the Commission determined that "[t]he evidence in the record *suggests* that the regulation of the flow of the Klamath River by the Iron Gate Dam combined with the construction and operation of the hatchery will result in a greater fish population than if Iron Gate had not been built. This would stem from the reduction or elimination of destruction of natural fluctuation and river levels which will follow from the construction of Iron Gate Dam and its operation in accordance with the year-round minimum releases required by Article 52 of the license. To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the status quo, but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions. Apportioning 20 percent of the operating costs to the Department will *more nearly* result in restoring the status quo." (Our emphasis)

The Department attacks this statement as inconsistent with the formal finding that the hatchery is needed to compensate for the loss of spawning grounds above Iron Gate, and is necessary to sustain the fishery at a level *"approximately equal"* to that which existed before the construction of Iron Gate. In this, the Department is perhaps technically correct. We do not think, however, that the matter should be treated with

such iron rigidity. As we have pointed out, the Commission was here dealing with predictions. The evidence does indeed "suggest" what the Commission says it does. Even the finding on which the Department relies deals only with conditions "approximately equal" to pre-Iron Gate conditions. We do not think that the Commission's conclusion is unreasonable. We need not consider the other bases for its order that are stated in the Commission's opinion. We neither approve nor disapprove them.

We do think, however, that Article 50 of the license is unclear in one respect. Rather than requiring Pacific to pay the full cost of operating and maintaining the hatchery at 80 percent of capacity, it requires that it pay 80 percent of the annual cost of operation and maintenance. Thus, if the Department chose to reject the benefit of full capacity operation (a benefit that the Commission does not claim that it can order the Department to accept) and operates at 80 percent, Pacific would pay only 80 percent of 80 percent. This appears to be inconsistent with the views expressed by the Commission itself. We presume that the Commission intends that, so long as the Department operates the hatchery at at least 80 percent of capacity, Pacific should pay for the cost of operating at 80 percent of capacity, but that in no event should Pacific be required to pay more than actual operating costs.

It may be that there is evidence now in the record, or that other evidence can be produced, that would justify the decision of the Commission as to the operation and maintenance of the fish trapping and egg taking facilities. That is a question for the Commission, not for us. (*Burlington Truck Lines v. United States*,

supra; F.P.C. v. Idaho Power Co., 1952, 344 U.S. 17, 20-1)

The matter is remanded to the Commission for further proceedings, not inconsistent with this opinion, relating to the cost of operating and maintaining the fish trapping and egg taking facilities, and for such clarification of Article 50 as it may desire to make. In all other respects, the orders of the Commission are affirmed.

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APPENDIX D.

[33 F.P.C. 1282.]

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr. and David S. Black.

PACIFIC POWER & LIGHT COMPANY, PROJECT NO. 2082

ORDER CLARIFYING LICENSE AND DENYING MOTION TO EXTEND TIME FOR CONSTRUCTION OF FISH HATCHERY.

(Issued June 23, 1965)*

On April 28, 1965, the Pacific Power & Light Company (Pacific) filed a motion to extend the period for construction of a fish hatchery at its Iron Gate Development, Project No. 2082, on the Klamath River in California.

Article 50 of the license for this project requires Pacific to pay the State of California 80 percent of the cost of operating and maintaining the fish hatchery (29 FPC 478, 486). An appeal was taken from the order issuing this license to the United States Court of Appeals for the Ninth Circuit. The Court in *Pacific Power & Light Company v. F.P.C.*, 333 F. 2d 689, 697 (1964), said:

> We * * * think * * * that Article 50 of the license is unclear in one respect. Rather than requiring Pacific to pay the full cost of operating and maintaining the hatchery at 80 percent of capacity, it requires that it pay 80 percent of the annual cost of operation and maintenance. Thus, if the Department [of Fish and Game of the State of California

*Rehearing denied by order issued August 20, 1965, 34 FPC—.

(Department)] chose to reject the benefit of full capacity operation (a benefit that the Commission does not claim that it can order the Department to accept) and operates at 80 percent, Pacific would pay only 80 percent of 80 percent. This appears to be inconsistent with the views expressed by the Commission itself. We presume that the Commission intends that, so long as the Department operates the hatchery at at least 80 percent of capacity, Pacific should pay for the cost of operating at 80 percent of capacity, but that in no event should Pacific be required to pay more than actual operating costs.

* * *

The matter is remanded to the Commission * * * for such clarification of Article 50 as it may desire to make.

Although the capacity of the hatchery is specified in Article 49 of the license (30 FPC 499, 503), Pacific contends that until the Department gives assurance that it will accept twenty percent (20%) of the cost of operation, the hatchery's capacity, and hence its design specifications, cannot be finally determined. Pacific requests that construction be postponed until this supposed uncertainty concerning the hatchery's capacity is settled.

On May 6, 1965, the Department filed opposition to Pacific's motion. The Department opposes delay of the construction on three grounds. First, it would be detrimental to anadromous fish runs in the Klamath River. Second, since the issue before the Commission relates only to reimbursement for the costs of maintenance and operation, there is no uncertainty as to the size and de-

sign of the fish hatchery, which have been stipulated to by Pacific. Third, the State of California will operate the fish hatchery at full capacity whenever the runs of anadromous fish provide the eggs for full capacity operation.

Pacific's motion to extend time for construction of the fish hatchery brings before us the question on remand to the Commission from the Ninth Circuit Court of Appeals as to the meaning of Article 50. We intend by Article 50 of the license that Pacific shall reimburse the State of California for 80 percent of the cost of actual operation and maintenance whether at full capacity or a lesser capacity. This clarification of the Article, and the Department of Fish and Game's statement of its intent to make full use of the fish hatchery, removes any reason that might have existed to review the hatchery's size and capacity. Thus, there is no need to delay construction. We therefore deny Pacific's motion.

The Commission finds:

It is appropriate and in the public interest in administering Part I of the Federal Power Act (16 U.S.C. 791-823) that Pacific Power & Light Company's motion, filed on April 28, 1965, to extend the time for construction of a fish hatchery at its Iron Gate development be denied.

The Commission orders:

The motion filed on April 28, 1965, by Pacific Power & Light Company to extend the time for construction of a fish hatchery at the Iron Gate development of Project No. 2082, hereby is denied.

APPENDIX E.

[34 F.P.C. .....]

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., David S. Black, and Carl E. Bagge.

PACIFIC POWER AND LIGHT COMPANY PROJECT NO. 2082.

ORDER DENYING PETITION FOR REHEARING

(Issued August 20, 1965)

On July 22, 1965, the California Department of Fish and Game (the Department) filed a petition "for rehearing or for any other appropriate form of relief" with respect to various Commission decisions and orders concerning fish facilities at Project No. 2082, owned by Pacific Power and Light Company (Pacific).[1] The prior proceedings with respect to the order on which rehearing is requested may be narrated briefly as follows:

On August 21, 1961, the State of California, acting by and through its Department of Fish and Game, filed a petition requesting that the Commission require the licensee to construct, operate and maintain a fish hatchery and appurtenant facilities, pursuant to Article 49 of the license for Project No. 2082 (25 FPC 579, 581). An answer to the petition was filed by the licensee on September 13, 1961. By order issued January 30, 1962, the Commission set the matter for hearing.

This Commission, in Opinion 381[2] and Opinion 381-A[3] required the licensee for Project No. 2082, Pacific

[1]The licensee, Pacific Power and Light Company, filed on August 2, 1965 a motion to strike certain portions of the Department's petition for rehearing. However, since we here deny the Department's petition, we find it unnecessary to rule on Pacific's motion.

[2]29 FPC 478, March 14, 1963.

[3]30 FPC 499, August 19, 1963.

Power and Light Company to construct a fish hatchery and certain fish trapping and egg-taking facilities which were included in Article 50 of the license as it appeared at the time of the hearing (25 FPC 579, 581). The Commission also required the licensee to reimburse the California Department of Fish and Game for 80% of the expenses incurred in the operation and maintenance of such facilities.

On appeal to the Court of Appeals for the Ninth Circuit, the Court upheld the requirement that the licensee construct the fish hatchery and the fish trapping and egg-taking facilities, and the requirement that Pacific reimburse the Department of Fish and Game for 80 per cent of the cost of operation and maintenance of the hatchery, but reversed the Commission's directive that Pacific reimburse the Department for 80 percent of the operation and maintenance costs of the fish trapping and egg-taking facilities.[4] The Court's ground for reversal on the latter issue was a 1959 agreement between Pacific and the Department which, the Court held, contemplated operation and maintenance of the fish-trapping and egg-taking facilities by the Department, but did not reserve to the Department the right to demand payment by Pacific for operation and maintenance costs of such facilities.

In remanding the case to the Commission on the questions relating to the fish-trapping and egg-taking facilities, the Court also suggested[5] that the Commission might desire to clarify its requirement that the licensee pay 80% of the operation and maintenance

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[4]Pacific Power and Light Company v. FPC, 333 F. 2d 689 (9th Cir., 1964); *Cert. denied. 379* U.S. *969,* January 18, 1965.

[5]333 F. 2d 689, 697.

costs of the fish hatchery. On June 23, 1965, the Commission issued an order clarifying the license for Project No. 2082 in this respect and this is the order on which rehearing is requested by the California Department of Fish and Game.

In its petition for rehearing the Department appears primarily to contend:

1) that Pacific Power should be required by the Commission to pay the entire cost of operation and maintenance of the fish hatchery and that the Commission erred in limiting Pacific's liability to only 80 percent of such costs; and

2) that the prior agreement between the Department and Pacific cannot and does not have the effect of absolving Pacific from liability to pay for any part of the fish-trapping and egg-taking facilities.

We are of the opinion that the Department's petition must be denied.

With respect to liability to pay the operation and maintenance costs of the fish hatchery, the Department shows us no good reason why we should depart from our past decisions and orders. The Department argues that this Commission's determination that Pacific should pay only 80% of the hatchery operation and maintenance costs is without foundation in substantial evidence. However, this question was disposed of by the Court of Appeals when, after a review of the law and the evidence supporting the Commission's determination, it held that the conclusion reached by the Commission was reasonable and should not be disturbed.[6]

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[6]333 F. 2d 689, 697.

The Commission, subsequent to the Court's decision, clarified the license provision with respect to the percentage of fish hatchery costs Pacific would be required to pay. The Department now contends that the license provision as clarified forces it, a state agency, to pay for 20% of the costs, and that such a requirement is unlawful. The Department made this same contention in the Ninth Circuit and that Court considered and disposed of this question also:

> There remains the Department's contention that the Commission could not require that it pay 20 percent of the cost of maintenance and operation of the hatchery. The Commission did not so order. It merely ordered that Pacific pay 80 percent.[7]

The situation remains the same. The Commission did not in its original determination require that the state pay any part of the operation and maintenance costs of the fish hatchery, and the order clarifying the license issued June 23, 1965 did not change this in any respect.

The Department's contention with respect to the costs of the fish-trapping and egg-taking facilities are equally insubstantial. The Court held that the 1959 agreement between Pacific and the Department excused Pacific from liability to pay for any part of the operation and maintenance costs of the fish-trapping and egg-taking facilities. The Department in its petition for rehearing concedes that the Ninth Circuit so held, but alleges that the Court erred. The Department then requests that the Commission somehow corrected this alleged error. In effect this is a request that the Com-

[7] 333 F. 2d 689, 697.

mission review and modify the decision of the Court which reviewed the Commission's decision pursuant to Section 313(b) of the Federal Power Act. This is an undertaking to which we could not aspire even if we were so disposed.

Although the Ninth Circuit remanded the case to the Commission for further proceedings relating to the operation and maintenance costs of the fish-trapping and egg-taking facilities there is in actuality nothing more for the Commission to do. The Court has held that the Commission could not disregard the agreement between Pacific and the Department which the Court interpreted as freeing Pacific from any obligation to pay the operation and maintenance costs of these facilities.

The Commission finds:

The petition for rehearing filed July 22, 1965, by the State of California Department of Fish and Game presents no question of fact or legal principle which has not been considered before, or which now having been considered would warrant any change or modification of our Opinion No. 381 and 381-A and our clarifying order issued June 23, 1965.

The Commission orders:

The petition for rehearing in the matter of Project No. 2082 filed by the State of California, Department of Fish and Game on July 22, 1965, is hereby denied.

By the Commission.

(Seal)

Joseph H. Gutride,
Secretary.

APPENDIX F.

Decree.

United States Court of Appeals, for the Ninth Circuit.

Department of Fish and Game of the State of California, Petitioner vs. Federal Power Commission, Respondent. No. 20435.

Before: Merrill, Browning and Duniway, Circuit Judges.

This cause came on to be heard upon the petition of the Department of Fish and Game of the State of California, filed October 15, 1965, to review orders of the Federal Power Commission issued by it on March 14, 1963, August 19, 1963, June 23, 1965 and August 20, 1965. The Court heard arguments of respective counsel on February 14, 1966 and has considered the briefs filed in this cause.

On consideration whereof and pursuant to the opinion rendered and filed on March 4, 1966, It Is Ordered, Adjudged and Decreed by this Court that as to the orders of March 14 and August 19, 1963 the petition is dismissed; the order of June 23, 1965 is affirmed; the order of August 20, 1965 is modified by inserting therein, immediately after the words "The Commission Orders:" the following:

> "The license for Project No. 2082, as amended, is further amended to provide as follows:
>
> "Article 50. Licensee shall reimburse the State of California Department of Fish and Game for 80 percent of the combined annual cost of actual operation and maintenance whether at full capaci-

ty or a lesser capacity of the facilities and appurtenances constructed pursuant to Article 49. Should Licensee and the State of California Department of Fish and Game fail to agree on the amount to be paid by the Licensee for this purpose, the Commission reserves the right to determine the amount of such annual payment, after notice and opportunity for hearing."

As so modified, the order is affirmed: the motion of the Department for a summary remanded is denied; the records in prior proceeding in case Nos. 18853 and 18954 are made a part of the record in this cause; the motion of the Commissioner for an extension of time in which to certify the record in this case to the Court is denied.

A True Copy:

Attest: July 18, 1966,
William B. Luck, Clerk,

By /s William E. Wlison,
William E. Wilson,
Chief Deputy.

Opinion of the United States Court of Appeals For the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Department of Fish and Game of the State of California, Petitioner, vs. Federal Power Commission, Respondent. No. 20,435 [359 F.2d 165].

[March 4, 1966]

On Petition to Review Orders of the Federal Power Commission

Before: Merrill, Browning and Duniway, Circuit Judges.

Duniway, Circuit Judge:

In our previous decision in this case we remanded to the Commission "for further proceedings, not inconsistent with this opinion, relating to the cost of operating and maintaining the fish trapping and egg taking facilities, and for such clarification of Article 50 as it may desire to make." (*Pacific Power & Light Co. v. FPC*, 1964, 333 F.2d 689, 697.) Certiorari was sought by the Department of Fish and Game of the State of California. This was opposed by the Commission on the ground, *inter alia*, that the case was not ripe for review, the issues raised being premature because on remand the Commission might conclude that there are sound reasons for requiring Pacific to bear some or all of the expense of operating and maintaining the fish trapping and egg taking facilities. In a conditional cross-petition for certiorari, Pacific took the same position. Certiorari was denied (379 U.S. 969) without comment.

Pacific then moved the Commission for an extension of time within which to construct the required fish

hatchery. The Commission denied the motion on June 23, 1965. Its order (33 F.P.C. ....) recites that there is no reason for delay because the size of the hatchery had been agreed to and the State had assured the Commission that it will operate the hatchery at full capacity whenever runs of anadromous fish provide eggs for full capacity operation. The Commission also clarified Article 50 of the license, saying, "We intend by Article 50 of the license that Pacific shall reimburse the State of California for 80 percent of the cost of actual operation and maintenance whether at full capacity or a lesser capacity." Thus the Commission complied with the second part of our mandate.

On July 22, 1965, the Department filed its "Petition for Rehearing, or for Any Other Appropriate Form of Relief", asking relief ". . . with respect to that portion of the Commission's Decisions and Orders, dated March 14, 1963 and August 19, 1963 (Opinions Nos. 381 and 381A, 29 F.P.C. 478) relating to Article 50 thereof, and to that portion of the Order Clarifying License, etc. dated June 23, 1965, which provides" the above clarification of Article 50. The petition also states: "Since there may be some doubt as to whether a petition for rehearing is the proper remedy . . . the Department seeks in lieu thereof any other form of relief which the Commission may deem appropriate . . . ."

The petition continues:

> "The Court also remanded this matter to the Commission for further proceedings relating to the cost of operating and maintaining the fish trapping and egg collection facilities on the assumption 'that there is evidence now in the record, or that other evidence can be produced, that would justify the

decision of the Commission as to the operation and maintenance of the fish trapping and egg taking facilities' (333 Fed.2d 689, 697 (col. 2)). No further proceedings have been taken by the Commission in this respect. The Commission did not modify Article 50 in its clarifying Order of June 23, 1965. It left Article 50 intact. The Department takes this to mean that the Commission finds evidence now in the record which justifies the requirement that Pacific reimburse the Department for the major part of the cost of operating and maintaining the fish trapping and egg collecting facilities, irrespective of the Court's interpretation of the 1959 Agreement, which interpretation, parenthetically, is erroneous both in law and in fact. On the other hand, we are informed that Pacific takes the position that Article 50 needs no modification specifically deleting the assignment to it of part of the cost of operating and maintaining the fish trapping and egg collecting facilities, contending that the Court's construction of the contract automatically relieves it of that obligation irrespective of whether or not Article 50 is modified by the Commission.

"If the Commission agrees with Pacific's position then the Department seeks a rehearing by the Commission as a fact-finding tribunal on the question of the effect and interpretation of the 1959 Agreement by showing that there is evidence now in the record and that other evidence can be produced to justify the Commission in assessing the cost of operating and maintaining the fish trapping and egg taking facilities to Pacific, or prays for some other form of relief or hearing deemed by the Commission to be meet and proper."

There follow 31 numbered "Specifications of Error and Grounds for Relief." Each, in a somewhat different form, is an attack on the two orders that were reviewed in our previous decision, or on the decision itself, insofar as they relate to Article 50 of the license. None raises a new question. Nowhere does the petition state what evidence in the record, or what other evidence that might be produced, would justify the Commission, on grounds of public policy, in disregarding the contract between the state and Pacific relating to the fish trapping and egg taking facilities.

The Commission, on August 20, 1965 (34 F.P.C. ....) denied the petition. In its opinion, the Commission refused to review the orders of March 14, 1963 and August 19, 1963. It concluded:

> "The Department's contention with respect to the costs of the fish-trapping and egg-taking facilities are equally insubstantial The Court held that the 1959 agreement between Pacific and the Department excused Pacific from liability to pay for any part of the operation and maintenance costs of the fish-trapping and egg-taking facilities. The Department in its petition for rehearing concedes that the Ninth Circuit so held, but alleges that the Court erred. The Department then requests that the Commission somehow corrected [sic] this alleged error. In effect this is a request that the Commission review and modify the decision of the Court which reviewed the Commission's decision pursuant to Section 313(b) of the Federal Power Act. This is an undertaking to which we would not aspire even if we were so disposed.
>
> "Although the Ninth Circuit remanded the case to the Commission for further proceedings relating

to the operation and maintenance costs of the fish-trapping and egg-taking facilities there is in actuality nothing more for the Commission to do. The Court had held that the Commission could not disregard the agreement between Pacific and the Department which the Court interpreted as freeing Pacific from any obligation to pay the operation and maintenance costs of these facilities."

The Department has now petitioned this court to review the orders of March 14, 1963, August 19, 1963, June 23, 1965 and August 20, 1965, as they relate to Article 50 of the license. Every ground asserted except two relates to the orders previously reviewed by this court or to the merits of this court's decision on review. The exceptions are:

"1. The Commission failed to follow the remand of the Court in its decision of June 8, 1964 (333 F.2d 689) in that it did not consider evidence now in the record which would justify the decision of the Commission as to the operation and maintenance of the fish trapping and egg taking facilities.

"2. The Commission failed to follow the remand of the Court in said decision by failing and refusing to consider 'other evidence that can be produced' which would justify the decision of the Commission as to the operation and maintenance of the fish trapping and egg collecting facilities."

The Commission moves that we dismiss the petition or affirm, on the ground that the petition is frivolous. Pacific also moves to dismiss, on the same grounds. We conclude that the orders of June 23, 1965 and August 20, 1965 should be affirmed, and that, as to the orders

of March 14 and August 19, 1963, the petition should be dismissed.

1. *The orders of March 14 and August 19, 1963.*

These orders were fully reviewed in our prior decision. The time for review has long gone by (16 U.S.C. §825*l*(b)). We affirmed them both except in the two respects set out at the beginning of this opinion. The Commission is bound by our decision. We think that we are also,[1] and we would not change it if we thought that we had the power.

2. *The June 23, 1965 order.*

This order complies with that portion of our mandate that suggested clarification of the 80 percent of capacity provision of Article 50 of the license, and denies a stay of the requirements of Article 49 for construction of a hatchery. The Department's petition does not attack either action. It only attacks the power of the Commission to impose less than 100% of the cost upon Pacific. This question we decided adversely to the Department in our previous decision.

3. *The order of August 20, 1965.*

We construe the Commission's decision, as the Commission does in its moving papers, as (1) an acquiescence in our previous decision, (2) a construction of it as a nullification of that part of Article 50 of the license reading "and of the permanent fish trapping, collecting, holding, and spawn-taking facilities con-

[1] *City of Tacoma v. Taxpayers*, 1958, 357 U.S. 320, 335-341. The Department says that one of its reasons for again raising the previously decided issues is that the Supreme Court may have denied certiorari solely because it agreed with the position of the Commission and Pacific that the petition for certiorari was premature. Whether that is so and what the consequences may be, are, we think, questions for that court.

structed at Iron Gate Dam," and (3) a determination that no showing was made that there is evidence in the record, or other evidence that can be produced, that would justify, on grounds of public policy, imposing on Pacific any part of the cost of operating and maintaining the fish trapping and egg taking facilities. (See 333 F.2d at 696-697)

The Department says that the Commission did not follow our mandate, which it construes as requiring a hearing on the last question. To this the Commission presents two answers.

a. Insofar as the Department's petition sought such a hearing, it was not a petition for a rehearing. Rather, it was a petition for a hearing on this question, based upon the Department's construction of our mandate. The Department's own petition indicates an awareness of this. And Pacific's motion to strike and answer to the Department's petition, filed with the Commission, forcefully brought the matter to the Department's attention. The statute says (16 U.S.C. § 825*l*(b)):

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."

No rehearing, following the August 20, 1965 order, was sought. Thus, it can be said that the question is not properly before us.[2]

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[2]In *Magnolia Petroleum Co. v. FPC*, 5 Cir., 1956, 236 F.2d 785, 789, *cert. denied*, 1957, 352 U.S. 968, and *Utah Power & Light Co. v. FPC*, 10 Cir., 1964, 339 F.2d 436 the courts refused to review orders made upon a petition for rehearing because no rehearing of those orders had been sought before the Commission. *Cf. FPC v. Colorado Interstate Gas Co.*, 1955, 348 U.S. 492.

The Department says, however, that all that the Commission did was to deny a petition for a rehearing so designated by the Commission in its order and that therefore the law has been followed. The Department also says that it construed the June 23, 1965 order as a determination that there was evidence in the record justifying imposing on Pacific at least 80% of the cost of operating and maintaining the fish-trapping and egg-taking facilities, because the Commission did not strike from Article 50 the language imposing that obligation on Pacific. It also argues that it construed our mandate as requiring the Commission, *sua sponte,* to hold a hearing and receive evidence on the question, and that the failure of the Commission to so order, evidenced by the June 23, 1965 order, was, in substance, a refusal to follow the mandate, so that the Department's petition was for a rehearing as to that refusal. It asks for a summary remand to the Commission with directions that such a hearing be held. It concludes that another petition for rehearing would be meaningless. We conclude that, because of the peculiar state of the record, there is indeed reasonable ground for the Department's failure to file another petition for a rehearing.

b. The Department misconstrues our mandate. We said that whether there is evidence in the record, or other evidence can be produced, is a question for the Commission, not for this court. This permits a further hearing; it does not require it. There is no showing that the Commission abused its discretion. No evidence, of either sort, was pointed to in the petition; there is nothing but a bare assertion. This, we think, is not enough to require a further hearing by the Commission. Absent some further showing, the Commission

was entitled to assume that during the lengthy proceedings already had the Department had produced all of the relevant evidence that it could find. A reading of the petition confirms us in this belief.

The Commission would have done a neater job, and the subsequent confusion would have been avoided, if it had modified Article 50 of the license to conform to our mandate. As amended by the March 14, 1963 order (it has not since been amended), it reads:

> "Article 50. Licensee shall reimburse the State of California Department of Fish and Game for 80 percent of the combined annual cost of operation and maintenance of the facilities and appurtenances constructed pursuant to Article 49 *and of the permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances constructed at Iron Gate Dam.* Should Licensee and the State of California Department of Fish and Game fail to agree on the amount to be paid by the Licensee for this purpose, the Commission reserves the right to determine the amount of such annual payment, after notice and opportunity for hearing." (Emphasis added)

We held that the emphasized language was unauthorized on the record before us, and that the 80 percent language was unclear. The Commission, to conform to our mandate, could have inserted the clarification set out in its June 23, 1965 order in Article 50, and stricken the emphasized language. It did neither. But neither party has asked for this particular relief. We presume that the Commission could so amend, to conform to our mandate and to its orders of June 23

and of August 20, 1965, *sua sponte,* since it construes them as having this effect.

The statute (16 U.S.C. § 825*l*(b)) specifically authorizes us to modify the Commission's order. We think that we should do so, to make explicit and clear what the Commission tells us that it intended. So doing will also make clear the result of the proceedings to date, to the end that, if the Department again seeks certiorari, there will be no doubt as to the finality of our own disposition of the proceeding.

As it relates to the orders of March 14 and August 19, 1963, the petition is dismissed. The order of June 23, 1965 is affirmed. The order of August 20, 1965 is modified by inserting therein, immediately after the words "The Commission Orders:" the following:

> "The license for Project No. 2082, as amended, is further amended to provide as follows:
>
> "Article 50. Licensee shall reimburse the State of California Department of Fish and Game for 80 percent of the combined annual cost of actual operation and maintenance whether at full capacity or a lesser capacity of the facilities and appurtenances constructed pursuant to Article 49. Should Licensee and the State of California Department of Fish and Game fail to agree on the amount to be paid by the Licensee for this purpose, the Commission reserves the right to determine the amount of such annual payment, after notice and opportunity for hearing."

As so modified, the order is affirmed.

The motion of the Department for a summary remand is denied. Both parties are agreed that the records

in the prior proceedings in this court, our Nos. 18,853 and 18,954, should be made a part of the record in this proceeding. It is so ordered. The motion of the Commission for an extension of time in which to certify the record in this case to the court is, pursuant to the suggestion of its counsel, denied.